

No. 16005

VOL. 3086

United States
Court of Appeals
for the Ninth Circuit

Vol. 3073

UNITED STATES OF AMERICA, Appellant,

vs.

OREN E. CUMMINS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

AUG - 4 1958

PAUL F. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,

SAMUEL D. SLADE,
ROBERT S. GREEN,
Attorneys.
Department of Justice,
Washington 25, D. C.

For Appellee:

ERNEST R. MORTENSON,
961 East Green Street,
Pasadena 2, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

Civil Action No. 18798-T

OREN E. CUMMINS,	Plaintiff,
vs.	
UNITED STATES,	Defendant.

COMPLAINT FOR DECLARATORY RELIEF,
AND MONEY DAMAGES

Plaintiff brings this action under the Act of May 29, 1930, 46 Stat. 468; U.S.C., Title 5, Section 691 (d), as amended; also known as Section 1 (d) of the Retirement Act, as amended, for \$760.00 and other relief, and alleges as follows:

1.

Plaintiff is an individual residing at 918 Encanto Drive, Arcadia, California.

2.

Plaintiff retired as an employee of the Internal Revenue Service, Treasury Department of the United States on November 30, 1954.

3.

Plaintiff's duties during employment were primarily the investigation and apprehension of persons suspected or convicted of offences against the criminal laws of the United States.

4.

Plaintiff was more than fifty years of age on November 30, 1954.

5.

Plaintiff on November 30, 1954, had rendered more than twenty years of service in the duty of investigation and apprehension of persons suspected or convicted of offences against the criminal laws of the United States. [2]

6.

The aforesaid services as alleged in par. 5, rendered by the plaintiff constituted a degree of hazard contemplated by Section 1 (d) of the Retirement Act, as amended.

7.

The life annuity of plaintiff has been computed and granted under Section 4 (a) of the Retirement Act, the Treasury Department and Civil Service Commissioner have neglected and refused to allow plaintiff's annuity under Section 1 (d) of the Retirement Act, as amended. Plaintiff has exhausted all administrative remedies through appeals.

8.

That on information and belief, the Civil Service Commission advised the Treasury Department that all time spent in the performance of duties specified in Section 1 (d) of the Retirement Act, and performed jointly with special agents were creditable toward retirement under Section 1 (d) of the Retirement Act, as amended, regardless of the title

of the position held by plaintiff, if such service is documented. During consideration of plaintiff's application for retirement under Section 1 (d) of the Retirement Act, as amended, the personnel branch of the Treasury Department requested from the Audit Division a documentation of cases plaintiff worked jointly with special agents, and that in response thereto Mr. Fellers, Chief, Audit Division, informed the Personnel Division, there was no record of the cases in which plaintiff worked jointly with special agents. During plaintiff's employment, plaintiff submitted, to the Audit Division, regular monthly reports showing all cases being worked jointly with special agents, and said reports are and were available [3] to Mr. Fellers, Chief, Audit Division, for documentation. The Commissioner of Internal Revenue has refused to recommend to the Civil Service Commissioner plaintiff's eligibility for retirement under Section 1 (d) of the Retirement Act, as amended because the Audit Division failed to document the cases plaintiff worked jointly with special agents. Wherefore, plaintiff prays for judgment, ordering defendant to pay to said plaintiff for the remainder of his life an annuity computed under Section 1 (d) of the Retirement Act as amended; and to pay to plaintiff the sum of \$760.00, this being the difference between an annuity computed under Section 1 (d) of the Retirement Act, as amended and an annuity granted and being paid under Section 4 (a) of the Retirement Act, as amended, representing \$76.00 per month for ten months from December 1, 1954, to and including,

September 1955; and to pay to plaintiff an amount of \$82.00 per month from October 1, 1955, until judgment, this being the difference between computation under Section 4 (a) and Section 1 (d) of the Retirement Act under an Act passed by the last Congress and effective as of October 1, 1955, and such other and further relief as this court may deem proper in the premise.

/s/ OREN E. CUMMINS,
Plaintiff.

Dated at Los Angeles Sep. 26, 1955.

Duly Verified. [4]

[Endorsed]: Filed September 26, 1955.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION TO DISMISS COMPLAINT

Notice Is Hereby Given that on February 6, 1956, at 10:00 o'clock A.M., in the Courtroom of the Honorable Ernest A. Tolin, Judge of the above-entitled Court, the United States Attorney will move to dismiss the plaintiff's Complaint.

The grounds for the Motion are as follows:

1. Lack of jurisdiction over the subject matter.
2. Failure to state a claim upon which relief can be granted.

The Motion will be based on the plaintiff's Com-

plaint and on the Memorandum of Points and Authorities attached hereto.

LAUGHLIN E. WATERS,

United States Attorney.

MAX F. DEUTZ,

Assistant U. S. Attorney,

Chief, Civil Division.

/s/ JOSEPH D. MULLENDER, JR.,

Assistant U. S. Attorney.

Attorneys for Defendant. [5]

Memorandum of Points and Authorities Attached.

[6-8]

Affidavit of Service by Mail Attached. [9]

[Endorsed]: Filed January 20, 1956.

[Title of District Court and Cause.]

ORDER ON MOTIONS TO DISMISS

The above-entitled cause having come on regularly for hearing on the defendant's Motions to Dismiss on March 5, 1956, at 10:00 o'clock A.M., before the Honorable Ernest A. Tolin, Judge of the above Court;

The plaintiff having appeared by his attorney, Ernest R. Mortenson;

The defendant having appeared by the United States Attorney;

The Court having considered the pleadings filed herein, the arguments of counsel, and being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed:
That the defendant's Motion to Dismiss for fail-

ure to state a claim upon which relief can be granted be and the same is hereby denied;

That the defendant's Motion to Dismiss for a lack of jurisdiction over the subject matter is granted, insofar as the Complaint seeks relief for moneys to become due in the future; [12]

That the plaintiff is granted leave to amend his Complaint to pray for Judgment for all sums which may have accrued up to the the date of Judgment, and that the plaintiff shall have thirty (30) days from March 5, 1956, within which time to file an Amended Complaint;

That the defendant may have sixty (60) days from the date of service of the Amended Complaint within which time to file an Answer.

Dated: This 14th day of March, 1956.

/s/ ERNEST A. TOLIN,
District Judge.

Presented By:

LAUGHLIN E. WATERS,
United States Attorney,
MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division,

/s/ JOSEPH D. MULLENDER, JR.,
Assistant U. S. Attorney,
Attorneys for Defendant.

Approved As To Form: this 9th day of March, 1956.

/s/ ERNEST R. MORTENSON,
Attorney for Plaintiff. [13]

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Pursuant to order of this Court entered on March 14, 1956, Plaintiff files herein the following amended complaint:

I.

This action is to recover balance due on the retirement annuity of Plaintiff from December 1, 1954 to the date of judgment herein as hereinafter more fully appears. Plaintiff is a citizen of the United States; Plaintiff's claim does not exceed Ten Thousand Dollars (\$10,000.00); and jurisdiction is conferred upon this Court by 28 USC, Section 1,346(a)(2). This suit is further brought for the purpose of obtaining a declaratory judgment, pursuant to 28 USC, Section 2201, that Plaintiff is entitled to retirement as an employee of the Internal Revenue Service, Treasury Department of the United States, under Section 1(d) of the Retirement Act as amended, Civil Service Retirement Act of May 29, 1930, USC, Title 5, Section 691 (d), as amended. [14]

II.

Plaintiff is an individual residing at 918 Encanto Drive, Arcadia, Los Angeles County, California.

III.

Plaintiff's duties during employment were primarily the investigation and apprehension of persons suspected or convicted of offences against the criminal laws of the United States.

IV.

Plaintiff was more than fifty (50) years of age on November 30, 1954.

V.

Plaintiff, on November 30, 1954, had rendered more than twenty (20) years of service in performance of the duties described in Paragraph III above.

VI.

The services described in Paragraph III which were rendered by Plaintiff constituted a degree of hazard encompassed by Section 1(d) of said Retirement Act.

VII.

The life annuity of Plaintiff has been computed and granted under Section 4(a) of the said Retirement Act by the Treasury Department and Civil Service Commission. The Treasury Department and Civil Service Commission, although requested to do so, have neglected and refused to permit plaintiff to retire with the annuity provided under Section 1(d) of said Retirement Act. Plaintiff has exhausted all administrative remedies and appeals. On information and belief the Civil Service Commission has advised the Treasury Department that all time spent in the performance of duties described in Section 1(d) of said Retirement Act and performed jointly with Special Agents were creditable toward retirement under Section 1(d) of said Retirement Act regardless of the title of the position held by Plaintiff, [15] provided such serv-

ices were documented. During the course of Plaintiff's application for retirement under Section 1(d) of said Retirement Act, the Personnel Branch of the Treasury Department requested from the Audit Division a documentation of cases Plaintiff worked jointly with Special Agents. In response thereto, Mr. Fellers, Chief, Audit Division, informed the Personnel Branch there was no record of the cases which Plaintiff jointly worked with Special Agents. During the period of Plaintiff's employment, Plaintiff submitted to the Audit Division regular monthly reports showing all cases being worked jointly with Special Agents and said reports were and are available to the Audit Division and other departments of the Treasury Department for documentation.

VIII.

The Commissioner of Internal Revenue has failed and refused to recommend to the Civil Service Commission that Plaintiff be retired under Section 1(d) of said Retirement Act and the Civil Service Commission has failed and refused to retire Plaintiff under Section 1(d) of said Retirement Act, contrary to the provisions of said Retirement Act.

Wherefore, Plaintiff prays for judgment ordering Defendant to pay to Plaintiff the sum of Seven Hundred Sixty Dollars (\$760.00), representing Seventy-six Dollars (\$76.00) per month for the ten months from December 1, 1954 to and including September of 1955, and in addition thereto to pay to Plaintiff an amount of Eighty-two Dollars

(\$82.00) per month from October 1, 1955 until the date of judgment herein. The said monthly sums of Seventy-six Dollars (\$76.00) and Eighty-two Dollars (\$82.00), respectively, represent the difference between computation under Section 4(a) and Section 1(d) of said Retirement Act. An amendment to said Retirement Act, passed at the last session of Congress and effective as of October 1, 1955, increases the differential between Plaintiff's monthly retirement annuity under Sections 4(a) and 1(d) from Seventy-six [16] Dollars (\$76.00) to Eighty-two Dollars (\$82.00).

Plaintiff further prays for judgment declaring and adjudging the Plaintiff is entitled to be retired under Section 1(d) of the Civil Service Retirement Act of May 29, 1930, as amended, and for such other and further relief as this Court may deem just and proper.

Dated: April 2, 1956.

/s/ ERNEST R. MORTENSON,
Attorney for Plaintiff. [17]

Duly Verified. [18]

[Endorsed]: Filed April 3, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and files this Answer to the Plaintiff's First Amended Complaint.

I.

Answering Paragraph I of the First Amended Complaint, defendant:

Admits that this action is to recover the balance due on a retirement annuity from December 1, 1954, to date of Judgment;

Admits that plaintiff is a citizen of the United States;

Denies that plaintiff's claim does not exceed \$10,000.00, and alleges that the District Court does not have jurisdiction to allow plaintiff's claim in an amount exceeding \$10,000.00;

Admits that jurisdiction is conferred upon this Court by 28 U.S.C.A. 1346(a)(2);

Admits that this suit is further brought for the purpose of obtaining a Declaratory Judgment, pursuant to 28 U.S.C.A. 2201, but denies that this Statute enlarges the jurisdiction of the [19] District Court, which is limited to \$10,000.00, as provided in 28 U.S.C.A. 1346(a)(2);

Admits that plaintiff is entitled to retirement as an employee of the Internal Revenue Service, but denies that he is entitled to retirement under Section 1(d) of the Retirement Act, as amended, Civil

Service Retirement Act of May 29, 1930, U.S.C. Title 5, Section 691(d), as amended.

Except as herein expressly admitted, each and all of the remaining allegations of Paragraph I of the First Amended Complaint are both generally and specifically denied.

II.

Answering Paragraph II of the First Amended Complaint, defendant admits all of the allegations therein contained.

III.

Answering Paragraph III of the First Amended Complaint, defendant denies both generally and specifically each and all of the allegations therein contained, and denies that the plaintiff's duties during employment were primarily the investigation and apprehension of persons suspected or convicted of offenses against the criminal laws of the United States.

IV.

Answering Paragraph IV of the First Amended Complaint, defendant admits all of the allegations therein contained.

V.

Answering Paragraph V of the First Amended Complaint, defendant admits that on November 30, 1954, the plaintiff had rendered more than twenty (20) years of service with the Internal Revenue Department, but denies that plaintiff's duties were such as those described in Paragraph III of the First Amended Complaint. Except as herein expressly admitted, each and all of the allegations of

Paragraph V of the First Amended Complaint are both generally and specifically denied. [20]

VI.

Answering Paragraph VI of the First Amended Complaint, defendant denies both generally and specifically each and all of the allegations therein contained; denies that the services described in Paragraph III of the First Amended Complaint were rendered by the plaintiff, and denies that the services described in Paragraph III of the First Amended Complaint or the services rendered by the plaintiff constituted a degree of hazard encompassed by Section 1(d) of the Retirement Act.

VII.

Answering Paragraph VII of the First Amended Complaint, defendant:

Admits that the life annuity of the plaintiff has been computed and granted under Section 4(a) of the Retirement Act, that the plaintiff requested retirement under Section 1(d) of the Act, and that the plaintiff's request was refused;

Alleges that the circumstances under which the plaintiff was denied retirement under Section 1(d) of the Act are as follows:

On November 4, 1954, the Acting District Director of Internal Revenue at Los Angeles, Harold Hawkins, wrote to the Regional Commissioner of Internal Revenue at San Francisco, California, and requested a determination of the plaintiff's eligibility for retirement under Section 1(d). With the

letter were enclosed the plaintiff's application for retirement, statements from the Chief of the Audit Division, and the plaintiff's group supervisor and plaintiff's personnel folder.

On November 12, 1954, the Chief of the Personnel Branch of the Regional Commissioner's Office, W. J. DeWeese, replied to the letter of November 4, 1954, and advised that the plaintiff was not eligible for retirement under Section 1(d). The reason given was that from an examination of the plaintiff's employment records it appeared that his duties were not primarily the investigation, [21] apprehension or detention of persons suspected or convicted of offenses against the criminal laws of the United States, but that his duties consisted primarily of examining books and records of tax payers to determine tax liability.

On November 17, 1954, the Chief of the Personnel Branch of the Los Angeles Office, Robert D. Hogan, wrote to the Regional Commissioner and requested that the plaintiff's application be forwarded to the National Office for final decision.

On November 23, 1954, W. J. DeWeese forwarded the plaintiff's application to the Assistant Commissioner, Administration, in Washington, D. C., and asked for a decision as to the plaintiff's eligibility for retirement under Section 1(d).

On December 3, 1954, the Chief of the Placement Branch in Washington, D. C., M. J. Flattery, replied to W. J. DeWeese's letter, and advised that the plaintiff was not eligible for retirement under Section 1(d). The reason given was that although

the Civil Service Commission had informally advised the Treasury Department that all time spent in the performance of specified duties may be creditable toward retirement under Section 1(d) of the Retirement Act, regardless of the title of the position, Mr. Fellers, Chief, Audit Division, had stated that there was no record of the cases which the plaintiff worked jointly with Special Agents, and no record of the degree of hazards; that since plaintiff did not occupy a position approved for inclusion under Section 1(d) of the Civil Service Retirement Act, he was not, in any case, eligible to have his retirement annuity computed under its provisions.

Except as herein expressly admitted, each and all of the remaining allegations of Paragraph VII of the First Amended Complaint are both generally and specifically denied.

VIII.

Answering Paragraph VIII of the First Amended Complaint, defendant: [22]

Admits that the Commissioner of Internal Revenue has failed and refused to recommend to the Civil Service Commission that plaintiff be retired under Section 1(d) of the Retirement Act, and that the Civil Service Commission has failed and refused to retire plaintiff under Section 1(d) of said Retirement Act;

Denies that such failure or refusal is contrary to the provisions of said Retirement Act;

Alleges that the plaintiff is not entitled to retirement under Section 1(d) of the Retirement Act.

Wherefore, defendant prays for a Judgment against the plaintiff as follows:

1. That the plaintiff take nothing by virtue of his First Amended Complaint;

2. For costs of suit, and such other relief as may be proper.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division,

/s/ JOSEPH D. MULLENDER,
JR.,

Assistant U. S. Attorney,
Attorneys for Defendant. [23]

Affidavit of Service by Mail Attached. [24]

[Endorsed]: Filed July 2, 1956.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT

Comes now the defendant, United States of America, and objects to Findings of Fact No. 7 as set forth in the proposed Findings of Fact lodged with the District Court on or about December 11, 1957.

Such objection is on the ground that the record of the trial is devoid of any evidence that plaintiff

was subjected to any degree of hazard whatsoever.

Dated: December 13, 1957.

LAUGHLIN E. WATERS,
United States Attorney,
RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,
/s/ RICHARD A. LAVINE,
Attorneys for Defendant. [76]

Affidavit of Service by Mail Attached. [77]

[Endorsed]: Filed December 13, 1957.

In the District Court of the United States, South-
ern District of California, Central Division

No. 18798-T

OREN E. CUMMINS, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The above entitled case having been duly set for argument on November 22, 1957 before the Honorable Ernest A. Tolin, Judge, presiding, Ernest R. Mortenson appearing as counsel for Plaintiff, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant United States Attorney, Richard A. Lavine, Assistant United States Attorney,

appearing as counsel for Defendant, United States of America.

Evidence having been taken and arguments of counsel having been heard, the Court hereby makes the following:

Findings of Fact

1.

The Plaintiff, Oren E. Cummins, a resident of California, was an Internal Revenue Agent from March 26, 1928 to November 30, 1954. [78]

2.

On October 1, 1928, Plaintiff was assigned to what is known as the "Fraud Group" and his duties were to make joint investigations with Special Agents of the Intelligence Division of persons suspected or convicted of offenses against the criminal laws of the United States. Plaintiff performed such duties from that date until November 30, 1954, the date of his retirement.

3.

On November 30, 1954, Plaintiff had reached the age of 70 years. During performance of his duties Plaintiff conducted many joint investigations of so-called "racketeers" suspected of having committed crimes against the Internal Revenue laws of the United States.

4.

In all cases in which a joint investigation of possible tax violations was conducted by Plaintiff and a Special Agent, where the Special Agent recommended prosecution of the taxpayer Plaintiff sub-

mitted a report of his investigation to accompany the Special Agent's recommendation.

5.

The following instructions were issued to Internal Revenue Agents charged with the duty of investigating fraud cases:

“Penalty Cases”

“Especially in fraud cases the investigation should be thorough and complete in every detail and the examining officer should arm himself with knowledge of every phase of the case for the further reason that he should be prepared to be an intelligent witness for the Government in the event of subsequent litigation, either in a civil trial before the Board of Tax Appeals in connection with the determination of penalty liability or in a criminal trial before the United States Federal Courts.

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6.

Under Rules and Regulations in force during Plaintiff's [79] tenure, a Special Agent could not recommend prosecution for tax evasion without an accompanying report of the Internal Revenue Agent who investigated the case jointly with such Special Agent.

7.

In the performance of his duties, Plaintiff was subjected to a degree of hazard as great as or greater than the degree of hazard to which the Spe-

cial Agent with whom he conducted the joint investigation was subjected.

8.

On October 18, 1954, Plaintiff made application for retirement under Section 691(d) of Title 5 USCA (Section 1(d)) and submitted certain information in support of his eligibility for retirement under said Section. The application was rejected.

9.

On May 2, 1955 the Secretary of the Treasury by his delegate, informed Plaintiff as follows:

“You have no appeal to the Civil Service Commission since retirement under Section 1(d) must be recommended by the head of the agency. It is not a right to which an employee becomes entitled by virtue of specific services but is discretionary with the Secretary of the Treasury.

Your case has received careful consideration but evidence has not been presented to conclusively prove that you performed the duties of a Special Agent, which is a position approved for coverage under Section 1(d). Therefore, we have no basis for ruling favorably on your appeal.”

10.

On February 7, 1955 the Secretary of the Treasury by his delegate, informed Plaintiff as follows:

“This refers to your letter concerning your eligibility for retirement under Section 1(d) of the Retirement Act.

The Treasury Department negotiated with the

Civil Service Commission a list of positions approved for inclusion under Section 1(d). The duties of such positions had to be within the scope of standards furnished by the Civil Service Commission. The position of Internal Revenue Agent, GS-512, in the Audit Division [80] has not been approved for coverage; the position of Special Agent (Tax Fraud), GS-1811, in the Intelligence Division is, however, covered.

As you requested, I am enclosing a list of the positions which have been approved by the Civil Service Commission."

11.

The list of positions approved by the Civil Service Commission for retirement under Section 1(d) is as follows:

"Internal Revenue Service
Positions Covered by Section 1(d),
Retirement Act

Alcohol and Tobacco Tax Division:

National Office: Director, Alcohol & Tobacco Tax Division, Chief, Enforcement Branch, Assistant Chief, Enforcement Branch, Technical Advisor, Examiner (Enforcement), Chief, Raw Materials Section.

Field Office: Assistant Regional Commissioner (if eligible because of prior enforcement service), Chief, Enforcement Branch, Supervisor in Charge (Enforcement), Special Investigator, Investigator (all positions designated by the CSC as Criminal Investigators).

Intelligence Division:

National Office: Director, Intelligence Division, Assistant Director, Intelligence Division.

Field Office: (if eligible because of prior enforcement service), Regional Commissioner, Assistant Regional Commissioner, District Director & Assistant District Director, Executive Assistant to ARC, Int., Technical Advisor, Chief, Intelligence Division, Assistant Chief, Intelligence Div., Chief of Branch, Group Supervisor, Senior Internal Revenue Agent (Special Agent), Principal Internal Revenue Agent (Special Agent), Internal Revenue Agent (Special Agent).

Inspection Service:

Group Supervisor and Criminal Assignment Squad, New York (6 in the 1811 Series). In order to be eligible, employee must retire from a covered position." [81]

12.

In a letter dated April 5, 1955, the Secretary of the Treasury by his delegate, informed Plaintiff as follows:

"It is mandatory that an employee occupy a position approved for coverage under Section 1(d) at the time he retires in order to have his annuity computed under its provisions. If an employee occupying a covered position needs time spent on detail from an uncovered position to a covered position to make up the necessary twenty years, such time spent on detail is creditable if properly documented.

Since the position of Internal Revenue Agent, which you occupied at the time you retired, is not approved for inclusion under Section 1(d), you are not, in any case, eligible to have your retirement annuity computed under the provisions of this Section. I am sorry, but we are unable to take any action in your case."

13.

In a letter dated March 2, 1955 the Civil Service Commission informed Plaintiff as follows:

"The office of the Regional Commissioner for the Internal Revenue Service informs us that at the time of your retirement you were not occupying a position which was approved for inclusion under Section 1(d) of the Retirement Act, and that no recommendation could therefore be made for your retirement under this Section.

Under the circumstances there is no authority for your retirement under Section 1(d) of the Retirement Act."

14.

The Secretary of the Treasury refused to recommend Plaintiff's Retirement under Section 1(d) on the ground that Plaintiff was ineligible because at the time of his retirement, he was not classified in a position approved for inclusion under section 1(d).

15.

In refusing recommendation of Plaintiff's retirement under Section 1(d), the Secretary of the Treasury did not consider the type of duties per-

formed by Plaintiff individually nor the degree of hazard to which he was individually subjected in the performance of his duties. [82]

16.

The Secretary of the Treasury in denying Plaintiff retirement under Section 1(d) gave consideration to the general duties of the class of position held by Plaintiff.

17.

The Secretary of the Treasury refused to recommend retirement of Plaintiff under Section 1(d) because of an erroneous interpretation of said Section.

18.

Although advised that Plaintiff had applied for retirement under Section 1(d), the Civil Service Commission failed to determine whether plaintiff was entitled to retirement under Section 1(d).

19.

The Civil Service Commission did not give consideration to the degree of hazard to which plaintiff was individually subjected in the performance of his duties.

20.

The Civil Service Commission gave consideration to the general duties of the class of the positions held by Plaintiff.

21.

The Civil Service Commission negotiated a list of positions covered by Section 1(d) because of an erroneous interpretation of said Section.

22.

At the date of his retirement, Plaintiff was more than 50 years of age and had rendered more than 20 years of service in a position, the duties of which were primarily the investigation of persons suspected or convicted of offenses against the criminal laws of the United States and the service actually performed was of such a nature.

23.

Plaintiff in the performance of his duties was subjected to [83] a degree of hazard contemplated by Section 1(d).

24.

All conclusions of law which are or are deemed to be Findings of Fact are hereby found as facts and are incorporated herein as Findings of Fact.

Conclusions of Law

1.

This Court has no jurisdiction to entertain an action for declaratory relief against the United States to determine whether Plaintiff is entitled to certain benefits under Section 691(d) of Title 5, USCA.

2.

This Court has jurisdiction over the action for money judgment pursuant to the provisions of the Tucker Act, 28 USCA Section 1346(a)(2).

3.

Plaintiff at the time of his application for retirement had satisfied all of the requirements for re-

tirement under Section 691(d) of Title 5, USCA and is entitled to have his annuity computed under said Section.

4.

In rejecting a proposed bill based upon position classification and in enacting Section 691(d), which provides, in part, "In making such determination, the Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties rather than the general duties of the class of the position held by such officer or employee," the Congress intended that each application for retirement should be considered on its merits without regard to the particular title of the position held.

5.

The failure of the Secretary of the Treasury and the [84] Civil Service Commission to grant Plaintiff's retirement under Section 691(d) was due to an erroneous interpretation of said Section in that the refusal of such retirement was based upon a classification of positions which had been set up contrary to the provisions of said Section.

6.

Plaintiff has exhausted his administrative remedies.

7.

All Findings of Fact which are or are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed:

That Plaintiff is entitled to money judgment in the sum of Seven Hundred Sixty Dollars (\$760.00); that Defendant shall take nothing in the action; that Plaintiff is hereby awarded costs of suit in the amount of \$.

Dated: This 13th day of December, 1957.

/s/ ERNEST A. TOLIN,
United States District Judge.

Defendants objections filed December 13, 1957 have been considered.

/s/ ERNEST A. TOLIN,
Judge. [85]

[Endorsed]: Filed and Entered December 13, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Defendant United States of America hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 13, 1957.

Dated: February 6, 1958.

LAUGHLIN E. WATERS,
United States Attorney,
RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,
/s/ RICHARD A. LAVINE,
Assistant U. S. Attorney,
Attorneys for Defendant. [87]

Affidavit of Service by Mail Attached. [88]

[Endorsed]: Filed February 6, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 92, inclusive, containing the original:

Complaint.

Motion and Notice of Motion to Dismiss.

Appearance of Ernest R. Mortensen as attorney for plaintiff.

Order on Motions to Dismiss.

Amended Complaint.

Answer.

Defendant's Trial Memorandum.

Supplement to Defendant's Trial Memorandum.

Plaintiff's Trial Memorandum.

Defendant's Second Supplemental Memorandum.

Objections to Findings of Fact.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Application for extension of time for filing and docketing record on Appeal and Order thereon.

Designation of Record on Appeal.

B. Minute Order of 3/5/56 re hearing on motion to dismiss.

Minute Order of 10/22/56 re trial.

Minute Order of 11/22/57 re Oral argument.

C. Plaintiff's Exhibits 1 to 10, inclusive.

Defendant's Exhibits A to F, inclusive.

D. One volume of Reporter's Official Transcript of Proceedings had on: October 22, 1956.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has not been paid by appellant.

Dated: May 6, 1958.

[Seal] JOHN A. CHILDRESS,

Clerk,

s/ By WM. A. WHITE,

Deputy Clerk.

In The United States District Court, Southern
District of California, Central Division

No. 18,798-T

OREN E. CUMMINS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

October 22, 1956

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Ernest R. Mortenson, 961 East Green Street, Pasadena, California. For the Defendant: Laughlin E. Waters, United States Attorney, By: Richard A. Lavine, Assistant United States Attorney, 600 Federal Building, Los Angeles, California, and Sidney J. Machtinger, Special Attorney, Internal Revenue Service. [1]*

Monday, October 22, 1956. 1:30 P.M.

The Court: Call our case.

The Clerk: 18,798-T, Oren E. Cummins, v. United States of America, for trial.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Mr. Mortenson: Ready for the plaintiff.

The Court: Mr. Mortenson, the court was impressed with the possibility that administrative remedies have not been exhausted. That seems to have a little more emphasis when we received the Government's supplemental memoranda the latter part of last week. What about that?

Mr. Mortenson: The situation is quite interesting, your Honor. In the file sent the United States Attorney by the Civil Service Commission there was omitted a letter addressed to Mr. O. E. Cummins, 918 Encanto Drive, Arcadia, California, dated May 2, 1955, in which the statement was made:

"Your final appeal is to the Director of Personnel, Treasury Department."

However, despite the fact that the plaintiff had been misled by the Treasury Department itself as to what his remedies were, subsequent to the filing of the memorandum of points and authorities by the defendant I wired the Civil Service Commission, stating that I wished to appeal under the section cited by the defendant, and I have a reply dated October 10, 1956, in which it is stated that the "* * * the [3] decision reached by the Retirement Division in your case is affirmed."

So that this final step has now been taken and the Civil Service Commission itself has affirmed the action of the Retirement Division. I shall offer this in evidence.

Mr. Lavine: Counsel is quite correct. We withdraw our point on that subject.

The Court: I have been bothered in this case by the fact that the fixing of the two per cent shall be on the recommendation of somebody. Is that recommendation a mere ministerial thing or is it one which must follow automatically from the existence of a certain set of facts, or does it involve an element of discretion?

Mr. Mortenson: My interpretation of that provision is that it is primarily ministerial. In my brief I pointed out the fact that at least one Congressional committee thought that it was compulsory for the Secretary of the Treasury to make the recommendation, if the retired person fit within the provisions of the code section.

However, the Dismuke case in the Supreme Court, and the Anderson case in the Ninth Circuit, I believe, are pretty clear on this point, that if the action of the Treasury Department is arbitrary or capricious the court does have jurisdiction, and I believe the cases also clearly hold if there had been a misrepresentation of the law on the part of [4] the Treasury Department, then the court has jurisdiction.

The Court: The exercise of that jurisdiction, though, can only lead us to perform an action that is before this court now, to the rendition of a money judgment. Who exercises the discretion which has been misexercised under your theory by the official who should have made the recommendation?

Mr. Mortenson: Well, if it is a question of mandatory or, rather, the declaratory judgment

part of the complaint, I would like to withdraw that and just leave the prayer for a money judgment.

Now, it is because of the error in interpretation of law by the Treasury Department that the plaintiff here is entitled to a money judgment.

The Court: Of course, the Government comes here and says, "This isn't a matter of a particular class of employee. It is a matter of right, being entitled to two per cent instead of one and one-half." It says, "The employee acquires that right if he has a particular recommendation," and the theory back of the recommendation is that it will bring about the earlier retirement of men who are past the vigorous age which is apparently necessary to subdue these persons who are subject to investigation in criminal cases. It involves, if the Government is right, rather an appraisal of the staff as a whole, than of the particular person whose retirement is in contemplation. And if that is what is to be considered or [5] if those are the things to be considered, I don't know how a court sitting here can appraise those matters.

Mr. Mortenson: I think, your Honor, that argument would have some force if we had a situation where a person requesting retirement for some particular reason should not be retired under that section. For example, if the employee were then under charges of some kind, I should think it would be within the discretion of the department head to refuse to recommend that the person be retired.

But in this case there has been no explanation

of any kind as to why retirement under this section should be refused, except a legal one. There are only two legal reasons given, and that is clear from the Civil Service file.

Reason No. 1, the title which this plaintiff bears is not one which is included in a list promulgated by the Treasury Department for inclusion in retirement under Section 1(d). I went into the history of that in my brief, and I think it is very clear that Congress never intended that any department of the Government should put out lists or should use classifications as a basis for determining eligibility. So that there was an error of law. I believe there the Treasury Department has clearly misinterpreted or misapplied this provision of the Civil Service Code.

Then the next objection that was given was that the plaintiff could not be retired under this section because his [6] work was not primarily that of investigating persons suspected of crimes against the United States. Now, that was put in terms of generality, and not that this particular plaintiff or individual didn't meet the requirements. It is that that class of individuals did not meet the requirements of the Code and, therefore, it becomes——

The Court: They took the view, didn't they, that the class of employment in which this plaintiff was classified was one which dealt primarily with accounting, and that that was not the investigation of persons suspected of crime?

Mr. Mortenson: That is basically the Govern-

ment's position, and that is the principal point which I believe this court is authorized and obligated to settle.

The Court: Tell me, has it been settled for us on a District Court level, at least, by some one of the other cases of this character which have been filed here?

Mr. Mortenson: The Anderson and the Dismuke cases are similar in some respects, but, as far as I know, this is the first plaintiff in the United States who was a member of a fraud squad—I believe the evidence is going to show there are only four or, at the most, six fraud groups in the United States, and in those groups only a small percentage would qualify.

The Court: What happened in the Gibney case?

Mr. Mortenson: The Gibney case is set for trial the 30th [7] of this month before Judge Yankwich.

The Court: I thought perhaps we would have the benefit of a Yankwich opinion by the time this case came up for trial, and that is what I was fishing for. But now that we have had our little colloquy, let's try the case. You try it in your way.

I was merely undertaking to point out to you some of the factors of the case, questions of the case which have particularly seemed to present some difficulty from my reading of the file.

Mr. Mortenson: I take it from your questions that you have read the briefs, so I don't believe that it will be necessary to make any statement about the issues in the case. It might facilitate

matters if we entered the documentary evidence at this point. I believe Government counsel and I are agreed on what should go in.

The Court: All right.

Mr. Mortenson: There are two depositions which have been filed, one of Vincent B. Murphy, presently group supervisor of the fraud group, who has an office in this building, and a deposition of Paris Claypoole, who formerly occupied that position. I should like to offer those at this time.

Mr. Lavine: No objection.

The Court: Received.

(The documents referred to were marked Plaintiff's Exhibits 1 and 2, and were received in evidence.) [8]

[See pages 79-135]

Mr. Mortenson: There is a file which is in the hands of the Assistant United States Attorney, Mr. Lavine, that—

Mr. Lavine: With your permission.

Mr. Mortenson: —might go in at this time, except there is one problem in connection with that. One of the exhibits contains a list of taxpayers who were subject to a fraud investigation, some of whom were not tried for tax evasion. We thought, as a matter of procedure, it might be advisable to have that list sealed by the court and then reference to it could just be made generally, if that procedure is agreeable.

Mr. Lavine: I would suggest it be stipulated, with the approval of the court, such list only be available to the clerk, this court and the trial

judge of the court, and be sealed and used thereafter, only upon retrial or appeal proceedings, if that is agreeable.

The Court: You are suggesting an in camera inspection of the list?

Mr. Lavine: Yes.

Mr. Mortenson: Yes.

The Court: It is agreeable to the court.

Mr. Lavine: Mr. Mortenson, I suggest we offer the administrative file, less the confidential exhibit, as Defendant's Exhibit A, which includes documents forwarded to us by the Department of the Treasury and the Civil Service Commission. [9]

As Defendant's Exhibit B I have placed in an envelope a list of cases prepared by the plaintiff in this action, which purports to be a list of some two hundred or so cases worked on by him as an internal revenue agent, involving suspected fraud cases, during the course of 27 years.

The Court: The exhibits offered are received.

(The document referred to were marked Defendant's Exhibits A and B, and were received in evidence.)

The Court: When you say "suspected fraud cases", are you referring to cases in which persons were suspected of civil fraud only, or how are you using the term "fraud"?

Mr. Mortenson: Criminal fraud. In all cases there was a suspicion that the taxpayer had been engaged in some criminal tax evasion.

Mr. Lavine: That is likewise the sense in which I used the word "fraud", your Honor.

The Court: All right.

Mr. Mortenson: A few of those exhibits have not been copied for my file, your Honor. Will it be necessary to get a court order to have copies made?

The Court: I think they are just available to you. You can copy them or have your secretary come in and make copies. The court record will be available, except for that Exhibit B of the defendant's, which I understand is restricted to my view. [10]

Mr. Lavine: By my stipulation I meant to include, also, counsel for plaintiff, who is well aware of the contents.

The Court: All right. Well, it will be available to your use then. I take it the object is to prevent the use of names here as persons who had been suspected of criminal action when it was administratively decided that the facts did not warrant prosecution.

Mr. Mortenson: That is correct, your Honor.

As Plaintiff's Exhibit 3 I should like to offer a letter dated October 10, 1956, addressed to the plaintiff by John E. Blann, Chairman of the Board of Appeals and Review.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 3 and was received in evidence.)

[See pages 136-137]

Mr. Mortenson: As Plaintiff's Exhibit 4, a letter addressed to the plaintiff, dated May 2, 1955,

signed by M. Latham, Jr., Acting Director, Personnel and Training Division.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 4 and was received in evidence.)

[See pages 137-138.]

Mr. Mortenson: As Plaintiff's Exhibit 5, a letter dated February 7, 1955, addressed to the plaintiff by Mr. M. J. Flattery, Chief, Placement Branch.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 5 and was received in evidence.) [11]

[See page 139]

Mr. Mortenson: Plaintiff's Exhibit 6, a letter dated April 5, 1955, addressed to the plaintiff by Mr. Flattery.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 6 and was received in evidence.)

[See pages 140-141]

Mr. Mortenson: As Plaintiff's Exhibit 7, I would like to offer an excerpt from an instruction manual entitled "Penalty Cases", prepared by the Special Adjustment Section, Income Tax Unit, April, 1935. The excerpt appears at page 8.

The Court: Received.

(The document referred to was marked

Plaintiff's Exhibit 7 and was received in evidence.)

[See page 141]

The Court: I take it, Mr. Mortenson, that upon these facts which you are now establishing or expect to establish by this and what other evidence you bring in, the court would be compelled to find there was only one way in which the discretion could be exercised?

Mr. Mortenson: I should like to make that statement. When I used the word "compelled" I meant to say I thought the court would be compelled to make a decision. It had jurisdiction, and it would be an issue of law on which the court would be compelled to make a decision. In other words, it is not the class of case where an administrative officer has used his discretion in determining what action should be taken on a particular set of facts. I believe there will be no factual [12] dispute in this case.

The Court: Well, suppose that the administrative officer has reached his administrative decision on a misconception of the law. He thought he should use one standard when he actually should have used another? Do we then use the standard he should have used? Would it not be more proper—but certainly not under this state of pleadings—for us to send it back to him and say, "Now, this is the standard you should have used. Go ahead and use it"? The sort of thing that might arise upon a suit based upon one of the extraordinary writs, for instance.

But in an action for money damages we can't do that. We either exercise his administration for him, we apply the standard he should have applied and find it adds up to a different rule than the arbitrary standard which he improperly applied, or we just substitute our judgment for his, or we find that he had no place in it except the performance of a ministerial act, that under these facts there is no possibility for anything except a determination that the two per cent should have been used instead of the one and a half.

Mr. Mortenson: Well, I would like to stand on two grounds. One is that this is purely a question of law, particularly related to the use of the word "primarily".

But I believe I have an alternate ground, and, that is, the action was arbitrary. [13]

The Court: But how could we tell it would have reached a different result if it had been considered in a judicious instead of a capricious and arbitrary manner?

Mr. Mortenson: I would be very happy for a decision in my favor on either ground.

Mr. Cummins, will you take the stand, please?

OREN E. CUMMINS

the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mortenson): Mr. Cummins, would you state your full name?

(Testimony of Oren E. Cummins.)

A. Oren E. Cummins.

Q. Is this your first appearance in the federal court, Mr. Cummins?

A. No, it is not; there have been many.

Q. Could you estimate the number of days you have been a witness in federal court in an official capacity?

A. In an official capacity?

Q. As a government agent.

A. Somewhere between a thousand and three thousand days.

Q. What is your present occupation, Mr. Cummins?

A. Public accountant.

Q. What was your occupation before you became a public [14] accountant?

A. Internal Revenue agent.

Q. When did you leave the employ of the Government as an internal revenue agent?

A. November 30, 1954.

Q. When did you begin service as an internal revenue agent?

A. I entered the Service March 26, 1928.

Q. At the time that you were so appointed, were you given a specific assignment?

A. No, I was not.

Q. What did you do when you first became an agent?

A. The time I became an agent, up till October 1st, 1928, I was assigned with another internal revenue agent for the purpose of instruction and learning how to be an internal revenue agent.

Q. And after that assignment, what happened?

(Testimony of Oren E. Cummins.)

A. On October 1st, 1928, I was assigned to what is known as the fraud group, Los Angeles Division.

Q. At that time was a letter written with respect to your assignment? A. Yes.

Q. I show you a document which is part of Defendant's Exhibit A, bearing the date October 1, 1928, addressed to you and signed by S. S. Stahl, and ask you whether that is the [15] letter to which you refer.

A. That is a photostat of the original letter which I have. No, I beg your pardon. It is not. That is a photostat of a typed copy of the original.

Q. Do you have the original? A. Yes, I do.

Q. Is this an accurate copy of the original?

A. With the exception of the signature of S. S. Stahl.

Mr. Mortenson: Very well. May we have this read at this time, your Honor?

The Court: Yes.

Q. (By Mr. Mortenson): Would you read that letter? Just read the body of it, please.

A. (Reading) "Due to the accumulation of work being handled jointly with the Intelligence Unit, it has become necessary to assign additional agents to assist in this work for an indefinite period.

"You have been selected as one to assist. Please get in touch with Internal Revenue Agent Warner E. Williams at your earliest convenience and arrange to work under his direct supervision until

(Testimony of Oren E. Cummins.)

released from that class of cases. As soon as this joint work is brought up to date, your services will again be utilized by your regular Group Chief, but during this assignment he will be relieved of all [16] supervision over your work."

The Court: What was the date of that?

The Witness: October 1, 1928. That is the time I had completed training.

The Court: Did you receive it at or about that time?

The Witness: No, I received it at that time.

Q. (By Mr. Mortenson): Will you state what accounting and legal training you have had, Mr. Cummins?

A. I am a graduate from the Kansas State University of Accounting. I took a course with a higher accounting firm in Los Angeles, whose name is Racine.

Q. Was it the Racine Institute of Accounting?

A. Racine Institute of Accounting, that is correct. And I finished a course of law with Blackstone University, from which I received an LL.D.

Q. That was an LL.B.? A. LL.B.

Q. That was a correspondence course, was it?

A. That is correct.

Q. Do you know, Mr. Cummins, or have you been advised as to the number of fraud groups that exist in the United States at the present time?

A. I do not know, except from observation and what I have been told there were. I do know for a certainty with respect to a couple of divisions,

(Testimony of Oren E. Cummins.)

that Chicago had a fraud [17] division at the time I went to Chicago one time on one of my cases. Seattle had a fraud division. I understand that New York had a fraud group. I believe there was one in Texas; I believe it was Dallas, I am not sure. Probably one in—I have had information there is one in Cincinnati.

Q. That is, there probably are not more than six fraud groups in the United States at this time?

A. I believe that would be correct, yes.

Q. As to the number of individuals in these fraud groups who might in any way satisfy the requirement of Section 1(d), you say the number would be under 100?

A. Oh, yes, I believe they would be much under 100.

Q. At the time of your retirement, did you apply specifically for retirement under Section 1 (d)?

A. I did.

Q. Without referring specifically to your own experience, what are the respective duties of a revenue agent and a special agent who work jointly on a fraud case? By that I mean a criminal tax fraud case.

A. Did you want me to outline the duties of each or the difference between them?

Q. I think if you would just state generally the duties of each, then we could make the comparison.

A. Well, to begin with, cases in which criminal evasion of income tax is involved, the cases arise

(Testimony of Oren E. Cummins.)

from two sources. [18] One is in the revenue agent's office and another in the special agent's office.

Years ago, the early years of high service, if it originated in the special agent's office it would be forwarded to the internal revenue agent's office and all cases there were assigned to the group that handled the fraud work. And the group supervisor would assign these cases to the various men under his supervision. All these cases so assigned—most all of them contained an information of some sort, some bookkeeper of a taxpayer or some friend or someone who stated that this particular taxpayer had been evading his income tax by this and by that method. After the case was assigned the revenue agent would proceed to investigate these charges. After the investigation had proceeded to a point where the revenue agent felt in his own mind that a criminal evasion of the income tax had been committed, it was his duty to call upon a special agent for cooperation in the case. At this point the special agent would join the revenue agent in the investigation, and the two agents would work together, both within the taxpayer's office, outside securing witnesses or any evidence that might be necessary to sustain the evasion case.

After evidence or information regarding the case had been gathered, it was the duty of the revenue agent to write his report. This report consisted of two separate reports. One we called a techni-

(Testimony of Oren E. Cummins.)

cal report, in which a computation was [19] made of net income, tax and penalties, if any were involved.

A second report, which was known as a confidential report, in which all evidence of whatever nature may have been gathered, was assembled, and in this report any statements that the taxpayer may have made that might be detrimental to him or evidence secured from witnesses other than the taxpayer, copies of books and records and bank accounts were all submitted in this confidential report.

At the end of this report we made our recommendation. This report—these two reports, after being typed, were sent to the special agent's office, after which they wrote their report and made their recommendations.

Q. In general, was this the procedure followed during the whole period during which you were an internal revenue agent? A. Yes.

Q. Under the rules and regulations in force during that period, was it possible to have a criminal tax evasion case without a revenue agent or deputy collector being assigned to the case?

A. No, I do not believe it would be possible; no.

Q. What is one essential that would be part of the revenue agent's work and part of the revenue agent's report, which would preclude the special agent from turning a case over for prosecution?

A. It would be the auditing feature and the writing of what we called the technical report,

(Testimony of Oren E. Cummins.)

which was a computation of income, taxes and penalties.

Q. In a joint investigation for tax fraud during the period of your tenure did a special agent have authority to order you to do any particular act?

A. He did not.

Q. Did the special agent with whom you worked have any disciplinary control over you?

A. No.

Q. In whom did supervisory and disciplinary powers rest insofar as you were concerned?

A. To the internal revenue agent in charge, through my group supervisor.

Q. And in the case of the special agent who cooperated with you in the investigation, who had supervisory powers over him?

A. The group—the special agent in charge, through the group supervisor in his office.

Q. In the actual conduct of an investigation of a tax evasion case, is there or was there a division between the criminal aspects of the case and the non-criminal aspects?

A. None that I could ever observe.

Q. Would you explain what those words mean as they have been used in various courts? I will withdraw that question. [21]

Did you ever investigate a criminal tax case in which you had practically completed the investigation before you referred the matter to the Intelligence Division? A. Yes, I have.

Q. In such a case, what would the function of the special agent be who was assigned to that case?

(Testimony of Oren E. Cummins.)

A. Well, I don't know what his functions might be. I know what they do.

Q. Tell us what——

A. They take the revenue agent's report and follow it and make their recommendations. That doesn't happen very often.

I would like to explain in particular with respect to one case which might clear up the reason for such cases evolving. I had a case a number of years ago which the taxpayer or corporation claimed on the return a loss of \$80,000.00. I had to finish that case before I knew whether I could overcome the \$80,000.00 loss and set up a tax. That was the reason that a special agent would not be called in until the case was completed. And in this case a fraud penalty was asserted and the special agent recommended criminal prosecution. I have forgotten whether I recommended criminal or not. I have recommended criminal in many cases.

Mr. Mortenson: May I use this confidential list, your Honor, to show to the witness? [22]

The Court: Yes.

Q. (By Mr. Mortenson): Mr. Cummins, I show you a list of names under dates, and ask you whether that is a list which you yourself prepared. A. It is.

Q. This is a list of taxpayers that were investigated by you for possible crime against the internal revenue laws of the United States, is that correct? A. That is correct.

(Testimony of Oren E. Cummins.)

Q. I show you a newspaper clipping which carries in the top left-hand corner a picture, under which is the name "Sol Zemansky". Does that name appear on your list? A. It does.

Mr. Mortenson: I should like to offer this into evidence as the Plaintiff's next in order.

The Court: Received.

The Clerk: Plaintiff's 8.

(The document referred to was marked Plaintiff's Exhibit 8 and was received in evidence.)

Q. (By Mr. Mortenson): I show you another newspaper clipping bearing the heading "U. S. Suit on McAfee Perturbs Politicians", and ask you whether that refers to a case which you investigated. A. It does. It is on this list.

Mr. Mortenson: I would like to offer this as the Plaintiff's [23] next in order.

The Court: Received.

The Clerk: Plaintiff's 9.

(The document referred to was marked Plaintiff's Exhibit 9 and was received in evidence.)

Q. (By Mr. Mortenson): On this list which you hold in your hand, are there names listed of individuals that were considered to be racketeers and questionable characters?

A. Yes, on this list, from the year 1931 to 1941 everyone, with the exception of one, is considered racketeers, gamblers, and there are others in other

(Testimony of Oren E. Cummins.)

years, but those ten years I worked practically nothing except racketeers.

Q. Mr. Cummins, what proportion of your time, from your appointment to the fraud squad in 1928 to the date of your retirement November 30, 1954, was devoted to investigation of taxpayers who were suspected of crimes against the United States?

A. All my time with the exception of perhaps a year or 18 months.

Q. As between the revenue agent and the special agent who worked a joint fraud investigation, which one is likely to spend more time with the taxpayer's associates and employees?

A. The revenue agent spends much more time.

Q. During the period of your employment did you keep a count of the hours and days spent on fraud work? [24]

A. Yes, I did.

Q. In the ordinary fraud case, during your tenure, who would be most likely to first contact the taxpayer, the revenue agent or the special agent?

A. The revenue agent.

Q. Mr. Cummins, I show you a copy which bears the legend "Internal Revenue Service Positions Covered By Section 1(d), Retirement Act", and ask you whether that is a copy of a list you received from the Treasury Department accompanying a letter dated February 7, 1955, signed by M. J. Flattery, Chief, Placement Branch.

A. It is.

Mr. Mortenson: This is offered as Plaintiff's No.——

(Testimony of Oren E. Cummins.)

The Clerk: 10.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 10 and was received in evidence.)

Q. (By Mr. Mortenson): In your experience in investigating criminal fraud cases, Mr. Cummins, would you say that you were exposed to danger as much as or less than a special agent with whom you worked?

A. I would say more than, because we spent more time with the taxpayer and employees.

Q. With respect to the so-called racketeers whom you investigated, would that statement apply? [25] A. Yes.

Q. Did you ever investigate a criminal tax case in which there was a double set of books?

A. Yes.

Q. Who audited the books?

A. I audited them.

Q. Did the special agent assigned to that case have any part in the auditing of those books?

A. He never saw the books.

Q. In a criminal tax fraud investigation, where admissions were made by the taxpayer, what was done insofar as your activities were concerned with respect to those admissions?

A. They were pointed out in my report. Usually any admissions or statements were taken under oath from a taxpayer, and they would be included as an exhibit within my report.

(Testimony of Oren E. Cummins.)

Q. Were there cases where damaging or incriminating admissions had been made by taxpayers to you? A. Yes.

Q. And in those cases was it also your practice to include a report of such admissions in your revenue agent's report? A. Yes.

Q. Did you testify in court concerning your audit and admissions made by the taxpayer? [26]

A. Many times, both criminal and civil.

Q. Did you investigate a number of cases in Phoenix, Arizona? A. I did.

Q. In one of those cases did you testify at length for the Government?

A. I was on the witness stand for the Government two weeks.

Q. Two weeks? A. Yes.

Q. Now, in that particular case did the special agent testify?

A. He was on the stand and answered one question.

Q. During your experience as a government internal revenue agent in these criminal fraud cases, with respect to the ones which went to trial, did you spend more time on the witness stand as a witness than all of the special agents you worked with combined, or less time?

A. I spent much more time. As a matter of fact, I only recall two of my cases in which a special agent appeared as a witness in a criminal.

Q. Do you recall that you previously stated that it was your practice to make a recommenda-

(Testimony of Oren E. Cummins.)

tion for or against criminal prosecution in the cases which you investigated?

A. I never did make a recommendation against criminal [27] prosecution. I have made many recommendations for criminal prosecutions. If I didn't think the Government had a good case I would not recommend criminal prosecution because I didn't want to have the special agent quarrel with me and say it should have been recommended otherwise, so I left it open.

Mr. Mortenson: You may cross-examine.

Mr. Lavine: Prior to cross-examining, your Honor, may I ask the court's permission to introduce a few documents through Mr. Machtinger, who is regional counsel of Internal Revenue in this area.

The Court: Yes. You mean he is going to start trying the case?

Mr. Lavine: No.

The Court: You represent the Government?

Mr. Machtinger: I will merely introduce the documents. I think I am more familiar with the documents than Mr. Lavine.

The Court: Are you then taking the position of a witness here?

Mr. Machtinger: No, I am entered as co-counsel for the defendant.

Mr. Lavine: Your Honor, I don't believe there is any objection to these exhibits from counsel.

The Court: Are you an Assistant United States Attorney?

(Testimony of Oren E. Cummins.)

Mr. Machtinger: No, sir, I am an attorney admitted to practice in the State of California, an attorney for the [28] Internal Revenue Service.

Mr. Mortenson: I have no objection, your Honor, to Mr. Machtinger appearing here. I don't mean to intrude on your province, but I will be very happy to have him take part in the trial.

The Court: All right, we will allow him to take part, although it is most irregular.

Mr. Mortenson: Personally I have been in the same situation, as you know, your Honor, and I have a great deal of sympathy for this technical approach. As a matter of fact, I think there was a time when you yourself argued that counsel in the chief counsel's office should be permitted to take part in the trial of cases.

The Court: Yes, but I was usually overruled in presenting such argument. I find, in allowing this participation today, I am considerably among the minority among the judges of the court. We will permit it.

Mr. Machtinger: Thank you, sir.

I would like to offer as Defendant's Exhibit next in order a document which is entitled "Procedure With Respect To Income Tax Fraud Cases", which is dated January 30, 1936, and designated as "Commissioner's Mimeograph Collection No. 4418."

The Court: Received.

Mr. Machtinger: The purpose of offering this document is to set forth the procedure that was in effect on January, I [29] believe I said 30th. It

(Testimony of Oren E. Cummins.)

is January 20th, 1936, and years subsequent to that.

The Court: You might show what the prescribed procedure was, what the book procedure was. It will be admitted and you can argue its effect when the time comes for argument.

The Clerk: Defendant's Exhibit C.

(The document referred to was marked Defendant's Exhibit C and was received in evidence.)

Mr. Machtinger: I would like to offer as Government's Exhibit next in order a document entitled "Procedure With Respect To Income Tax Fraud Cases", dated September 18, 1937, bearing "Commissioner's Mimeograph Collection No. 4653." This mimeograph, your Honor, amended the prior one, and the penciled notations on the Government's exhibit offered prior to this one incorporate the provisions of this mimeograph now being offered.

The Court: Received.

The Clerk: Defendant's D.

(The document referred to was marked Defendant's Exhibit D and was received in evidence.)

Mr. Machtinger: As Defendant's E, I offer as Government's exhibit a document bearing Paragraph No. 9322 from the Internal Revenue Manual dated October 3, 1955. This is entitled "Fraud Cases Initiated In Audit and Collection Divisions

(Testimony of Oren E. Cummins.)

Indications of Fraud Reported to Intelligence Division." [30]

The Court: Received.

The Clerk: Defendant's Exhibit E.

(The document referred to was marked Defendant's Exhibit E and was received in evidence.)

Cross Examination

Q. (By Mr. Lavine): Mr. Cummins, in your various cases in which you have worked on fraud aspects of income tax cases, have you always worked with a special agent before the case was concluded?

A. No, I have not.

Q. Let us say that a case was referred to the regional counsel, or whatever the procedure was in 1927 on. In other words, it was recommended by someone for criminal prosecution.

In those cases which fit that category in which you have taken part, has there been any case in which the recommendation for criminal prosecution has been made by somebody, in which you took part, in which there was not a special agent took part?

A. I don't know of any. That was a matter of procedure. It was necessary a special agent be assigned.

Q. Mr. Cummins, I show you Defendant's Exhibit C, which purports to be a regulation dated January 20, 1936, and I direct your attention to the next to the last paragraph on the bottom of that first page. Will you kindly read that?

(Testimony of Oren E. Cummins.)

A. "Investigations Internal Revenue Agents In Charge——" [31]

Q. You can read it to yourself. I will ask you questions on it in a moment.

A. Oh. (Witness complies.)

I have read it.

Q. The first sentence of the paragraph to which I directed your attention reads as follows:

"If during an income tax investigation an internal revenue agent finds what he believes to be indications of fraud, he will immediately suspend his investigation and report his findings in writing to the Internal Revenue Agent in charge, who will forward a copy to the Special Agent in charge."

Was that procedure followed by you at all times, let's say, from 1936 on to 1954?

A. I did not fall within that classification. I was an internal revenue agent, fraud group. This applied to field agents, not to persons working fraud cases.

Q. Do I understand there was some other regulation that was applicable to your——

A. I don't know of any other regulation, but the procedure was different. If it was a fraud agent that discovered fraud he didn't go through this procedure. He simply asked for a special agent.

Q. Let's go to the second sentence there:

"If the Internal Revenue Agent in Charge [32] concludes that the findings indicate probable fraud, he will promptly advise the appropriate Special

(Testimony of Oren E. Cummins.)

Agent in Charge of such findings and request his consideration whether the facts are such as to indicate the necessity for a joint investigation."

Was that procedure followed in the cases investigated by you?

A. Not with respect to the fraud group.

Q. What was the procedure followed by you?

A. With respect to this last paragraph you read, instead of the internal revenue agent referring it to the internal revenue agent in charge, the field agent referred matters to the fraud group investigator, who in turn either supervised the investigation under that agent up to the point when a special agent was called, or took it away from the field agent and gave it to one assigned to the fraud group who was familiar with the procedure.

Q. Let's turn over to page 2, if you will. Will you kindly read that first paragraph at the top of page 2?

A. (Witness complies.) I have read it.

Q. That first sentence states:

"During a joint investigation of an income tax fraud case the Internal Revenue Agent will be responsible for the audit features of the case and the development of evidence necessary to sustain the fraud penalty." [33]

Was that the procedure followed by you and those that worked with you? A. Yes.

Q. It was the responsibility, I understanding, that the internal revenue agent, which is you, for the audit features——

(Testimony of Oren E. Cummins.)

A. Not only the audit features. It doesn't confine it to the audit features.

Q. What more were you responsible for, Mr. Cummins?

A. All evidence necessary to support the audit features, which also supports the criminal.

Q. I read you the third sentence of the same paragraph, which reads:

"The Special Agent will be responsible for the criminal feature of the case."

Do I understand that your procedure was different than set forth in this regulation?

A. I wouldn't say that either agent was responsible for criminal liability. All either agent did was to make recommendations. There was no responsibility of the special agent other than to make his recommendations after he wrote his report, and jointly work with the agent, or the agent jointly work with him, whichever way you put it.

Q. In answer to a previous question you stated these regulations were not applicable to your particular fraud group. [34]

A. I said that with respect to the first part of the first paragraph.

Q. That part is not applicable. I have asked you questions as to Paraph 1 on page 2. Are those sentences applicable to the duties of you in your work on the fraud squad? A. Yes.

Q. The only part that you object to then is the first two sentences in the paragraph from the bot-

(Testimony of Oren E. Cummins.)

tom of page 1, which begin, "If during an income tax * * * "? Do I so understand your testimony?

A. The paragraph, "If during an income tax investigation an Internal Revenue Agent finds what he believes to be indications of fraud, he will immediately suspend his investigation and report his findings in writing to the Internal Revenue Agent in Charge, who will forward a copy to the special Agent in Charge."

That was not the procedure in the group squad.

Q. Could you tell us who set forth the procedure which you should follow as a member of the fraud squad?

A. Internal revenue agent in charge.

Q. The internal revenue agent in charge set forth the procedure you should follow. Was this in writing or orally?

A. I don't know. It came to me through the group supervisor.

Q. The group supervisor told you what to do and you [35] were told to do it in a certain way.

A. I don't know that he told me what to do. We just did that, that is all; that is the way we work it. What the authority is I am not going to argue, because this is what we did.

Q. You testified, Mr. Cummins, that in your opinion you were in a greater danger than that of a special agent that may be assigned to the case. Have you ever been assaulted?

A. No, sir.

Q. In the performance of your duties.

(Testimony of Oren E. Cummins.)

A. No, sir.

Q. Have you known of any other internal revenue agent who has been assaulted, criminally assaulted in the performance of his duties?

A. Neither internal revenue agent nor special agent.

Q. Did you at any time carry a gun in the performance of your duties? A. No, sir.

Q. Were you authorized, permitted to carry a gun in the performance of your duties?

A. I was not prohibited from carrying a gun.

Q. It wasn't part of the paraphernalia you are supposed to carry as an internal revenue agent?

A. No, I was supposed to carry a briefcase and get evidence. [36]

Q. Have you ever been present at any arrest in the performance of your duties? A. No.

Q. Have you been present when any search warrants were served in the performance of your duties?

A. That is the duty of the Collector of Internal Revenue.

Q. You have not been present when such were served? A. Yes, I have.

Q. You have? A. Yes.

Q. Who were they served by?

A. Deputy Collector.

Q. Deputy Collector of Internal Revenue?

A. Deputy Collector.

The Court: Have you ever acted as guard for a witness or anything of that kind?

(Testimony of Oren E. Cummins.)

The Witness: No. I acted as a guard for Japanese property, but not as a witness.

Q. (By Mr. Lavine): Have you ever been present when any structure was broken into by officers of the law in the performance of your duties?

A. No, sir.

Q. Have you been present when structures were entered subject to a search warrant? [37]

A. Yes.

Q. What type of case was that?

A. Jeopardy assessments.

Q. Jeopardy claims?

A. Jeopardy assessments.

The Court: I was assuming that your question was simply unfortunate, because federal agents don't go around breaking into places. They search with search warrants and proceed according to the Constitution.

Q. (By Mr. Lavine): Until the development of a fraud case in which there has been a recommendation made for criminal prosecution, is not part of the processing of the case done by the regional counsel's office of the Internal Revenue Service?

A. Well, after the report of the internal revenue agent and the special agent, I believe the report goes to that—to the regional counsel.

Q. In the conduct of your cases, have you ever known an instance in which the regional offices or members of the regional counsel's office have taken part by interviewing witnesses?

A. Yes.

(Testimony of Oren E. Cummins.)

Q. By examining documentary and other evidence that is necessary for the development of the case? A. Yes.

Q. Now, let's suppose a case has gotten over [38] into the hands of the U. S. Attorney and his assistants. Have you ever known a case in which you were involved in which the United States Attorney or an Assistant United States Attorney has gone out and interviewed witnesses in the development of a case?

A. No, I haven't. They usually call on either the special agent or the revenue agent to do the footwork.

Q. Have you ever heard of a case in which the U. S. Attorney or Assistant U. S. Attorney has gone out and interviewed witnesses or examined documentary evidence? A. No.

Q. Have you ever had occasion to shadow a suspect, a person who was suspected of violating one of the internal revenue laws?

Q. What type of case was that?

Mr. Mortenson: I don't think this witness knows what the word "shadow" means; at least I don't. I object to the form of the question.

The Court: You mean he is not familiar with the words common to the art or the vocation?

The Witness: I understand the meaning of the word "surveillance".

The Court: Let's use the loftier language, counsel.

Q. (By Mr. Lavine): Have you ever taken part in the surveillance of a person or witness suspected of criminal activity? [39]

(Testimony of Oren E. Cummins.)

A. I have, but not with anyone else.

Q. Would you explain the circumstances in which that act occurred?

A. The taxpayer evaded me. I left word at his office a number of times to leave his books for my examination, and he would not. He would not see me. I knew he was giving a lecture at a certain place on a certain hour, at a certain auditorium. I went out there at 9:00 o'clock at night and waited for him, to serve a summons.

The Court: Waited for him to serve a summons?

The Witness: Waited for him, to serve a summons on him, and I caught him.

Q. (By Mr. Lavine): Other than that one instance, have you ever had occasion to use surveillance on a suspect?

A. No, that is the only time.

The Court: Well, have you known of persons holding the same rank as yourself being engaged in the work of surveillance of suspects or witnesses?

The Witness: Yes.

Q. (By Mr. Lavine): Would you describe the circumstances?

A. I wouldn't know the circumstances, only from hearsay.

Q. Isn't that the job of the special agent, to go out and pick up—I should say exercise surveillance over criminal suspects?

A. I think that is the job of the Bureau of [40] Investigation, not the special agent.

(Testimony of Oren E. Cummins.)

Q. Do I understand your answer is that the Federal Bureau of Investigation has any jurisdiction over crimes against the Internal Revenue Code?

A. You didn't say of the Internal Revenue Code——

Q. I will limit my question to that. If so, would your answer to my question be any different?

Mr. Mortenson: Would you mind reading that question?

Mr. Lavine: The only thing—I will reframe the question in the interest of simplicity.

Q. (By Mr. Lavine): Other than the instance which you have quoted, have you ever known of any other internal revenue agent who has exercised surveillance upon any person suspected of violation of the internal revenue laws?

A. Yes, I have.

Q. Would you describe that?

A. It happened—I think of another case I did——

Q. Will you describe——

A. ——in conjunction with a special agent.

Q. What were the circumstances?

A. Working on a case down in New Orleans, Governor of Louisiana, there were about 20 agents and 20 special agents and the Governor had about 30 gum shoes out watching us, and we made it part of our business to watch them.

The Court: What is a "gum shoe"? [41]

The Witness: Detectives.

(Testimony of Oren E. Cummins.)

Q. (By Mr. Lavine): Isn't it a fact, Mr. Cummins, in the investigation of an income tax evasion case, that the principal part of your duties consist in, A, auditing of books; B, verification of various supporting documents, such as bank vouchers, statements, other items which would verify the entries in the taxpayer's books, and all other documentary evidence you can find? Is that not a fact?

A. Well, this other documentary evidence that I might find, what limit do you put on that, if any?

Q. I asked—I used the word in its broadest sense, documentary evidence of all kinds.

A. That was our duty, yes.

Mr. Lavine: No further questions.

Redirect Examination

Q. (By Mr. Mortenson): Mr. Cummins, during your tenure as an internal revenue agent on how many occasions did the special agent, who was in the joint investigation, carry firearms?

A. I never knew of a special agent carrying firearms on duty.

Q. Did you have anything to do with firearms when you were an internal revenue agent?

A. No. I used to go down in the basement of the Federal Building and practice revolver shooting, the same as the [42] special agents did.

Q. In the basement of this building?

A. Yes.

Q. You practiced pistol shooting, is that correct?

A. Yes.

(Testimony of Oren E. Cummins.)

Q. You do know how to shoot a gun, don't you, Mr. Cummins? A. Yes, I do; I have one.

Q. With regard to the criminal and the non-criminal features of a tax case, what ordinarily is used to prove the element of criminal intent?

A. The accounting features are the principal evidence in most cases, either net worth or an analysis of the books and other evidence to support it.

Q. Have you been in cases where a criminal intent was proved primarily by documentary evidence? A. Yes.

Mr. Mortenson: No further questions.

Mr. Lavine: No further questions.

(Witness excused.)

Mr. Mortenson: Plaintiff rests.

Mr. Lavine: As Defendant's next in order I would like to introduce the "Tasks and Performance Requirements Statement" for Grades 11, 12 and 13 of an internal revenue agent of the Audit Division. [43]

The Court: Received.

The Clerk: Defendant's F.

(The document referred to was marked Defendant's Exhibit F and was received in evidence.)

Mr. Lavine: I will call Mr. Vincent Murphy.

The Court: How long do you expect to be?

Mr. Lavine: About five minutes.

The Court: All right.

VINCENT B. MURPHY

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Vincent B. Murphy.

Direct Examination

Q. (By Mr. Lavine): Mr. Murphy, what is your occupation or profession?

A. I am an internal revenue agent, supervising a group.

Q. Does your group have any special title, popular title?

A. It is Group No. 7 of fraud investigations only.

Q. For how long have you been supervisor of this fraud group?

A. Since November 2, 1949.

Q. In the work of the fraud group of which you are the supervisor, if during a tax investigation an internal revenue [44] agent should find what he believes to be indications of fraud, what is then supposed to be done, according to regulations?

A. In this division, where we have a special fraud group, the regular agent in the field might find fraud and he would submit an information report to the fraud group and we would try to develop it further before we would call in the special agent for joint investigation.

Q. Supposing a fraud case has developed within your group, what does the internal revenue agent

(Testimony of Vincent B. Murphy.)

assigned to your group do once he has found what he definitely suspects to be fraud?

A. He will request cooperation of the special agents.

Q. Do I understand that until that is acted upon favorably or unfavorably he will suspend his activities?

A. Those are his orders.

Mr. Lavine: No further questions.

Cross Examination

Q. (By Mr. Mortenson): Mr. Murphy, do you happen to know when this particular set of instructions marked Defendant's Exhibit F went into effect, approximately the time?

A. Well, this is the test and performance requirements for the regular field audit group. I think it has been in effect, oh, for a number of years, although it has just been [45] recently put on the new form.

Q. It seems to bear a date of '54 at the bottom of the page. Does that mean this particular one was printed up in 1954?

A. That is right. But in addition to this, the fraud agents have further tests and performance requirements.

Q. Was it your understanding, Mr. Murphy, that the general instructions to internal revenue agents with respect to fraud cases were to be modified to the extent it was necessary for you to operate your fraud group in Los Angeles—I am re-

(Testimony of Vincent B. Murphy.)

ferring specifically to this statement on Defendant's Exhibit C:

"If during an income tax investigation an Internal Revenue Agent finds what he believes to be indications of fraud, he will immediately suspend his investigation and report his findings in writing to the Internal Revenue Agent in Charge, who will forward a copy to the Special Agent in Charge."

Was that procedure in Los Angeles during the time that you were group supervisor of the fraud squad? A. Yes, sir, it was.

Q. I thought that you had stated that the revenue agent made a report to you as group supervisor. Was that through the internal revenue agent in charge? A. That is right. [46]

Q. So that what this really means is the report was made to the internal revenue agent in charge to assign the matter to you, is that correct?

A. That is right. We made a further preliminary investigation to see whether we should call in the special agent.

Mr. Mortenson: That is all.

Mr. Lavine: No further questions.

(Witness excused.)

Mr. Lavine: Defendant rests.

The Court: Anything further from the plaintiff?

Mr. Mortenson: Not unless you have some further questions. I would like to present as much of my oral argument today as would help enlighten the court.

The Court: The court would like to become acquainted with a considerable mass of exhibits. I take it ~~one~~ is the administrative file, isn't it?

Mr. Mortenson: Yes, your Honor.

The Court: Before hearing the oral argument, that is, I ought to know the evidence before I hear the argument. Don't you think that would be a prudent procedure?

Mr. Mortenson: Are you going to set a date then for further——

The Court: Yes, it has come in so fast and I haven't had an opportunity to keep current on it. The trial commenced at 1:30 and you have put in quite a bit here, and I take it, [47] from the looks of it, there are at least several dozen pages and I think the court should be entirely familiar with those before hearing the argument. I know your lawsuit involves but a few dollars in this present suit. But it might become *res judicata* so as to affect a great deal of future payments to the plaintiff. I think it would be prudent to put the case over for argument until the court has had opportunity to read these exhibits.

Mr. Mortenson: I think the court may take judicial notice of the fact that in 1956 an amendment to the Retirement Act was passed, which now provides for retirement at two per cent for regular internal revenue agents.

The Court: Then you really are fighting over the seven hundred some-odd dollars.

Mr. Mortenson: As applied to less than a hundred, perhaps less than fifty.

The Court: As applied to this plaintiff.

Mr. Mortenson: It is a very small amount, so far as the Government is concerned. It is very big as far as he is concerned, your Honor.

What I was trying to say was that if he had not retired until now he would get this same two per cent that is in issue at this time.

The Court: Still don't you think that it would be prudent, considering the somewhat vague status of the legal [48] questions here, if the court were fully informed as to the contents of the exhibits before undertaking to follow your argument upon it?

Mr. Mortenson: Yes. I would like to come back for oral argument at any time which you would care to set now or on notice.

Mr. Lavine: That is quite agreeable.

Mr. Machtinger: In connection with Mr. Mortenson's statement about the amendment to the Retirement Act, the important point I think your Honor is putting his finger on is that this case may be res judicata to those other employees permitted to retire at age 50.

The Court: It couldn't be, they are not parties to the suit. It would be res judicata as to this plaintiff's rights concerning future payments. We have jurisdiction here, as I understand it, to only determine what is due up to the time of the filing of the complaint, and if I make a determination of what formula is to be used, I think that would be res judicata as to all payments thereafter to be made to this plaintiff.

Mr. Mortenson: I feel sure that the general accounting office would act upon your judgment and would pay in accordance with it in the future.

The Court: They haven't always done so.

Mr. Mortenson: We wouldn't have to bring a number of [49] suits.

The Court: Well, how long should we wait here before having the oral argument? The evidence, the oral evidence heard today will not be difficult for the court to retain in memory, because it has simply recited, in the specific instance of Mr. Cummins, what has been known to those in this type of government work to be true as to many employees of his class. So I will not have difficulty in retaining a present recollection of the oral testimony. But I would like time to read these various documents.

How long do you think I should have, bearing in mind I do not read them after 10:00 o'clock in the evening?

Mr. Mortenson: I much prefer to have you read these in the fresh part of the morning, your Honor. I can come back any time it suits your convenience.

The Court: When is that other case involving this point going to be tried?

Mr. Lavine: October 30th, your Honor, next Tuesday.

Mr. Mortenson: I think that Judge Yankwich, with his administrative duties as well as the trial of cases, would appreciate your contribution to this particular problem, your Honor.

The Court: I think that it would probably be

better if we had the senior judge's expression first. They don't do that in the appellate courts. They make the youngest one [50] speak out first. But here I think we will let the senior judge decide his case first, and perhaps we can pick up some wisdom from his remarks.

Suppose we argue this case on the 9th of November? Is that all right? It is a Friday.

Mr. Mortenson: Yes, that is agreeable to the plaintiff.

Mr. Lavine: Yes.

The Court: 10:00 o'clock. November 9th at 10:00 o'clock. We will not expect any briefing. If you wish to put in a brief, either of you, it will be read.

Mr. Mortenson: If it is just a matter of the money judgment, then I don't think I will submit any further brief on the matter.

The Court: What bothers me actually is the jurisdiction of the court to render any kind of a judgment here, other than dismissal for want of jurisdiction. It seems to me, just on the first reading of the law, that the jurisdiction here is in the Civil Service Commission and not in the District Court.

Mr. Mortenson: Well, I think that reading of the Dismuke and Anderson cases will dispel any doubt in your mind. Those cases have been cited dozens of times with approval.

The Court: The unfortunate thing about my coming to the bench not prepared on that today is that your brief didn't reach me until Saturday morning. I have not had an opportunity [51] to

read the cases cited therein. I have read the brief, but not the cases.

Mr. Mortenson: Mr. Lavine, I believe, was in Fresno the early part of last week, when I was ready to discuss the matter with him. I felt that I should go over it with him before I filed my brief. When he got back I just had time to get the brief ready and get it filed.

The Court: It is just one of those things that necessitates our putting the case over a little further. I want to read those cases, as well as the exhibits, before coming to a decision.

The case is continued to the 9th of November at 10:00 o'clock for argument, with an option to either of you to provide any further reading matter which you feel might be of assistance to the court.

(Whereupon, at 3:15 o'clock p.m., Monday, October 22, 1956, an adjournment was taken to Friday, November 9, 1956, at 10:00 o'clock a.m.) [52]

[Endorsed]: Filed May 2, 1958.

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

DEPOSITION OF PARIS B. CLAYPOOLE

taken on behalf of the plaintiff, at Room 625, Federal Building, Los Angeles, California, commencing at 4:00 o'clock p.m. Wednesday, October 10, 1956, before Charles C. Jenkins, CSR, Notary Public, pursuant to the annexed Stipulation.

Appearances of Counsel: For the Plaintiff: Ernest R. Mortenson, Esq. For the Defendant: Laughlin E. Waters, United States Attorney, Max E. Deutz, Assistant United States Attorney, Chief of Civil Division, by Richard A. Lavine, Assistant U. S. Attorney, and Sidney J. Machtinger, Special Attorney, Internal Revenue Service. [1]*

PARIS B. CLAYPOOLE

having been first duly sworn, deposed and testified as follows:

Direct Examination

Q. (By Mr. Mortenson): State your name, please. A. Paris B. Claypoole.

Q. What is your present business address?

A. Suite 709 Rowan Building, 458 South Spring Street, Los Angeles.

Q. What is your business or occupation?

A. I am presently engaged in income tax practice, income tax consultant.

Mr. Machtinger: We will stipulate he is the

* Page numbers appearing at top of page of Original Deposition.

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

same Mr. Claypoole that testified in the Gibney case, and his functions and duties were the same, he would now testify they were the same as he testified in the Gibney deposition.

Mr. Mortenson: So stipulated.

Mr. Lavine: So stipulated.

Q. (By Mr. Mortenson): Were you formerly an Internal Revenue Agent? A. Yes, sir.

Q. And are you retired from the Service, the Internal Revenue Service?

A. Yes, I retired on December 31, 1953. [2]

Q. What was your official position on the day of your retirement?

A. Internal Revenue Agent.

Q. Were you at that time a Group Supervisor?

A. No, sir.

Q. Had you been a Group Supervisor in Los Angeles prior to your retirement?

A. Yes, sir.

Q. When were you first assigned to the Los Angeles office of the Bureau of Internal Revenue, Mr. Claypoole? A. About August 4, 1930.

Q. Later were you made a Group Supervisor?

A. Yes, sir.

Q. And what year was that?

A. March 17, 1941 to September 30, 1949.

Q. During the time you were an Internal Revenue Agent and Group Supervisor, was Oren E. Cummins an Internal Revenue Agent in that group, which was the Fraud Group? A. He was.

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

Q. Do you know when Mr. Cummins became a member of the Fraud Group?

A. No. Mr. Cummins was a member of the Group when I arrived in Los Angeles. He was assigned to it.

Q. So that you know he was a member of that group from 1930 until the time you left, is that correct? [3] A. Yes, sir.

Q. During the time you were an Internal Revenue Agent in the Fraud Group, were you generally familiar with the type of work performed by Mr. Cummins? A. I was.

Q. Were you generally familiar with the cases on which he worked? A. I was.

Q. What proportion of the cases assigned to Mr. Cummins involved persons suspected of criminal evasion of tax?

A. It was my recollection that all of them were.

Q. I show you a list of names which appear under certain dates, which I believe is a copy of an exhibit in the Civil Service file. Would you identify that, Mr. Lavine?

Mr. Lavine: That appears to be the same list, Mr. Mortenson.

Mr. Machtinger: That is Exhibit B in the Civil Service file.

Mr. Lavine: In the Cummins file it is Exhibit D.

Q. (By Mr. Mortenson): After examining that list of names, Mr. Claypoole, do you recognize and do you recall any of the individuals listed there?

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

A. Yes. Most of them are quite familiar to me, and I recall almost all of them. [4]

Q. Were any of the individuals named classified in what was known as the "racketeer" category?

A. Yes, sir.

Q. Would you say there were quite a number which would be so classified?

A. Yes, I would say so.

Q. To your knowledge, was Mr. Cummins assigned to cases which required him to have personal contact with individuals who were known to be hoodlums or questionable characters?

A. Yes, sir.

Q. During the period from 1930 until you left the Fraud Group, what proportion of Mr. Cummins' time was involved in the investigation of individuals suspected of criminal fraud?

A. It is my recollection that all of that time was devoted to such investigations.

Q. Mr. Claypoole, you have previously testified in a similar matter involving a retirement case on the part of Internal Revenue Agent L. W. Gibney. Would your answers regarding the functions and duties of Revenue Agents and Special Agents be the same or different?

A. My answers to those questions would be the same.

Mr. Mortenson: May it be stipulated, Mr. U. S. Attorney, that the questions and answers in the case of Gibney versus United States, Civil Action

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

No. 19867-Y, be [5] made a part of this deposition, insofar as they relate to Mr. Cummins' case, the testimony of Mr. Claypoole, and that such questions and answers be copied physically into this deposition by the reporter?

Mr. Lavine: It may be so stipulated that the entire testimony, both direct, cross, redirect, recross, and so forth, may be so handled.

Mr. Mortenson: Very well. I have one further question.

Q. With regard to the cases investigated by Mr. Cummins, were Special Agents assigned to work jointly with him in most or all of the cases?

A. I would say in most of them.

Q. Will you explain generally the functions of a Revenue Agent and of the Special Agents when they are conducting a joint investigation in a criminal fraud case?

A. The function of the Revenue Agent was to establish a correct income tax liability of the taxpayer, to determine if there was a fraud involved in the case; if he had established sufficient indication of fraud, he thereupon would request the cooperation of a Special Agent. After the Special Agent was assigned to the case the Agents worked jointly, the Revenue Agent completing his investigation and preparing a report of his findings and his recommendations, and thereafter the report was submitted to the Special Agent and the Special Agent prepared his report and made his recommendations

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

concerning the matter of fraud or otherwise. [6]

Q. During the conduct of a joint investigation for criminal income tax fraud, did the Special Agent have authority to order the Revenue Agent to perform any particular act?

A. I would say that he had not.

Q. Who was the immediate supervisor of the Revenue Agent regularly assigned to such a joint investigation?

A. A Revenue Agents' Group Supervisor.

Q. Who was the immediate supervisor of the Special Agent who was assigned to a joint investigation?

A. The Group Supervisor of the Special Agent.

Q. Under the rules and regulations, did the Special Agent assigned to a joint investigation have any disciplinary powers over the Revenue Agent who was assigned to that same case?

A. None whatever.

Q. After a Special Agent had been assigned in a criminal fraud case, normally what was the function of the Revenue Agent in that case?

A. The normal function of the Revenue Agent was to complete his technical examination of the tax liability, make his report, and to cooperate with the Special Agent on all of his assignments in connection with the case.

Q. In actual practice, Mr. Claypoole, can you say that there would be a division of duties that

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

would relate to criminal features of a case, as distinguished from [7] non-criminal features?

A. I have never so construed it.

Q. When reference is made to the instructions which state that the Special Agent is responsible for the criminal features of a fraud investigation, what do you interpret that to mean?

A. I have always interpreted that to mean that he was responsible for assembling in his report all evidence as to criminal liability, and that his report contained recommendations concerning that liability.

Q. How many years of experience did you have in fraud investigations as an Internal Revenue Agent and Group Supervisor?

A. My first fraud investigation was made sometime in the year 1921, and continued without interruption until September of 1949, and from September 1949 until December 31, 1953 I devoted some time to fraud investigations.

Q. From your long experience in this field, Mr. Claypoole, as between a Revenue Agent and the Special Agent, which one is more likely to spend time with the taxpayer, his associates and his employees, where there is a joint investigation for criminal fraud?

A. The Revenue Agent.

Q. In the ordinary criminal fraud case, from your experience would you say that the Revenue Agent would be most likely to be the first to talk to the taxpayer, or [8] would it be the Special Agent?

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

A. My experience has been that it is almost invariably the Revenue Agent has made the first contacts with the taxpayer and his representatives.

Q. During the time that you investigated fraud as an Internal Revenue Agent, or during the period when you were a Group Supervisor, did you learn of threats or acts of violence against Internal Revenue Agents? A. None whatever.

Q. From your experience in the criminal fraud field, Mr. Claypoole, would you say that Revenue Agents, as compared with Special Agents, were exposed to more danger, the same danger, or less danger?

A. I would say more danger; and qualify it to this extent, that the Revenue Agent spent more time with the taxpayer and his representatives, and for that reason only would there be more danger. In no circumstance that I can recall would there be less danger.

Q. Mr. Claypoole, assuming that a taxpayer kept a double set of books, one of which contained figures corresponding with those on the tax return, and another set which accurately reflected his gross and net income, which was higher than the amount reflected in the return, as between the Revenue Agent and the Special Agent, who would examine those books, audit them, and report on them?

A. The Revenue Agent.

Q. And in your experience, in such a type of case, [9] who would be the witness for the Govern-

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

ment in testifying concerning the contents of the books, and such interpretations as might be derived from the circumstances?

A. The Revenue Agent.

Mr. Machtinger: May I ask if you would read the latter part of his question again? "Contents of the books" and what else?

(The question was read.)

Q. (By Mr. Mortenson): In your experience in the investigation of fraud cases, Mr. Claypoole, and their prosecution in the Federal District Court, can you state whether more Revenue Agents or fewer Revenue Agents, as compared to Special Agents, were witnesses for the Government?

A. Well, I would say that in my experience, the Revenue Agents were almost universally the Government's witnesses, and would carry the burden of prosecution which resulted from the investigation.

Q. When an expert witness was called for computation of tax to verify the allegations in the indictment, would a Revenue Agent be called as a witness, or a Special Agent?

A. A Revenue Agent would be called.

Q. In your experience in fraud prosecutions, were there any cases of prosecution for tax evasion where a Special Agent conducted the investigation without the cooperation of a Revenue Agent or a Deputy Collector? [10]

A. None whatever.

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

Q. What, during the time you were an Internal Revenue Agent and Group Supervisor, was used as Exhibit 1 to the Special Agent's report which went forward with the recommendation for prosecution? A. The Revenue Agent's report.

Q. And briefly, Mr. Claypoole, will you tell us what that Revenue Agent's report ordinarily contained?

A. The Revenue Agent's report contained all of the data necessary to establish the tax liability of the taxpayer, and all other information pertinent to the establishment of fraud and/or criminal prosecution.

Q. Can you state who made the computations which went into the tax deficiency figures that appeared in the indictments?

A. The Revenue Agent.

Q. Do you recall when the Intelligence Unit first became a part of the Treasury Department?

A. It is my recollection that it was sometime in 1919, just about the time I entered the Internal Revenue Service.

Q. Prior to the time that the Intelligence Unit was organized, were investigations of tax evasion conducted and were prosecutions had?

A. Yes.

Q. I understand you to say, then, that investigations and prosecutions for tax evasion preceded the time when there were Special Agents?

A. I would have to qualify it to this extent, that it is my recollection that there was. Now, it

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

may have happened immediately after they created the Intelligence Unit. It is my recollection now that it had occurred prior to the formation of the Intelligence Service.

Mr. Mortenson: That is all. Any cross-examination?

Mr. Lavine: Yes.

Cross Examination

Q. (By Mr. Lavine): Mr. Claypoole, as I understand it, in the investigation of a criminal fraud case there are normally two elements in the case, both factually and legally. Those are, (1) the auditing feature, whether there is a tax due or not; and (2) whether there is any criminal intent. Is that a correct summary of the elements of a criminal tax case? A. That is right.

Q. Now, directing our attention to the first element, the audit feature—is there a tax due?—whose responsibility was it primarily to establish that in a joint investigation?

A. The Internal Revenue Agent.

Q. Now, turning our attention to the second element, [12] that of the criminal intent, whose responsibility was it primarily to develop that feature of the investigation?

A. Well, that was joint, although the question of what is criminal and what is not criminal is always a matter of the greatest concern to all parties, and the mimeographed instructions in recent years provided that that was the Special Agent's option.

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

Q. In this connection, I would like to read to you Section 4566.1 (1) of the Internal Revenue Manual, which was in effect at the time that Mr. Cummins retired and applied for retirement under the provisions of the law upon which this case is based, which reads as follows, and I quote:

“Responsibility in all full-scale investigations for the development of evidence and for recommendations pertaining to the potential criminal features of the case and the ad volorem additions to the tax for civil fraud, negligence or delinquency (excepting those concerning the tax estimations) shall be that of the Special Agent unless and until he withdraws from the case. He will be responsible for the method of procedure and conduct of the investigation. The cooperating officer will be responsible for the audit features of the case. The [13] Internal Revenue Agent will also be responsible for taking any action necessary to protect the interests of the Government in respect to the statutory period for assessment.”

Now, having read to you that regulation, does that represent during the period of years related to, the division of responsibility between the Internal Revenue Agent and the Special Agent in the conduct of a joint investigation?

A. I am quite familiar with the matter that you have just read. It was a matter of continuous discussion throughout the years whose responsibility was it to do this or that or the other thing. The

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

Revenue Agent was very often—and in a number of cases, the case was completed before a Special Agent was in the case, all of the evidence was established. Now, that was true in cases that other men with whom I had worked engaged in. So it was not a clearly defined area. There was always a hazy grey area as to where one man stopped and the other man took over.

Q. Do I understand that you say this was a controversial point which in some cases the Internal Revenue Agent almost completed, or in your words, completed his investigation before the Special Agent came in, and finally through the haziness and confusion and mild controversy the matter was determined and delineated by an appropriate [14] regulation?

A. No. That is restating old regulations. You see, originally it started out that there were no regulations at all, and the Revenue Agent originally presented his case upon direction of the Commissioner to the United States Attorney. Then the next step was they established an organization in Washington in the Chief Counsel's office in the Joint Division to review those matters, and then the Special Agent's case, and both reports were examined; and throughout the years there has been a change in those regulations and procedures; and there always has been, and it may be to this day, so far as I know, still some area that is not clearly defined, because as was pointed out at the beginning,

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

the Revenue Agent when he makes his investigation, he has to first determine whether there is evidence of fraud. Now then, when he is determining evidence of fraud, frequently he has to establish all of the facts necessary for prosecution, and that is why the Revenue Agent has done his work, and then the Special Agent is called in merely as a procedural matter in many cases—and this happened many, many times—because of the matter of processing his report and the Revenue Agent's report.

Q. Does this regulation then pretty much embody the principles upon which the earlier regulations and procedures were based?

A. Well, there are modifications that I at this [15] moment couldn't specify, wherein they are; but it has been out of this area of disagreement for years. It has been straightened out where there was no conflict between the two branches, because frequently it was quite customary for the Revenue Agent to carry the burden of the case from the beginning right down until the jury brought in a conviction or the equivalent. That has happened many, many times throughout the years.

Q. Now, let us take a typical case by way of example, say investigating Mr. Smith. Let us say for example there is nothing special about Mr. Smith, he owns just a factory down the road, and the Internal Revenue Agent, Field Division, or whatever you call it, is performing some work, and he audits the books for a period of two or three

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

years, whatever the case might be. Upon the compilation of all his figures, he finds or suspects that there is fraud. What does he do at that point?

A. Are you speaking of presently, or what happened——

Q. Well, let us take a period prior to 1947.

A. Well, in that period—and that was during the period when I had the group over there—this is what happened: If that situation developed in any group outside of my group, when the case was assigned to me I looked into it, I sized up the Agent to find out how well qualified he was, and if he was well qualified he was automatically shifted over to my group or supervision, during which time [16] I supervised his work on that case, carried it on to such time as I believed it was concluded, and if necessary we called in a Special Agent.

Now, if it happened in my own group, as we did have those things happen, the Agent would carry right on up to the point where we decided, "Well, this is the time we have to call in a Special Agent; there is evidence of fraud here, here are the facts that we have developed here," and so forth. Then we would call in a Special Agent.

Q. And from that point on what would the Special Agent do in that investigation?

A. Well, to be brutally frank, and to say something I don't like to say, in many cases nothing but

Plaintiff's Exhibi No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

the Revenue Agent when he makes his investigation, he has to first determine whether there is evidence of fraud. Now then, when he is determining evidence of fraud, frequently he has to establish all of the facts necessary for prosecution, and that is why the Revenue Agent has done his work, and then the Special Agent is called in merely as a procedural matter in many cases—and this happened many, many times—because of the matter of processing his report and the Revenue Agent's report.

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Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Caypoole.)

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that [] what would the Special Agent []

think, and to say something [] many cases nothing but

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

take the Revenue Agent's report and paraphrase it and make his recommendations.

Q. Would it be the responsibility of that Special Agent to go out and further develop the element of intent, or any other criminal elements that were missing so far in the investigation?

A. If there was anything missing, yes; but frequently it happened, and it happened quite often, there was nothing missing in the cases, and that happened very frequently. It is something that I would prefer not to say about my friends in the Intelligence Unit, but it was a fact.

Q. Now, let us take a similar situation. We have Mr. Joe Jones down the street, who is suspected of being a [17] bookmaker, and a member of your squad is designated to audit his returns for the last three-year period prior to 1947. What happens in that situation?

A. In that case the Agent would proceed with his investigation, and to reach that point in the investigation where we believed that there was sufficient evidence to justify the request for the cooperation of a Special Agent. And sometimes actually in a case like that we would find no evidence of fraud. He might be suspected of being a bookie, and we found no evidence of it, and we closed the case there, and no Special Agent ever appeared in the case.

Q. And during this period of time in which you were working on the case, in the meantime is he

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

supposed to go to the taxpayer and tell the taxpayer fraud is suspected?

A. I didn't quite follow you.

Q. During the period of time at which your Internal Revenue Agent is working on the case of Joe Jones, bookie, is it part of his responsibility, or does he customarily go to the taxpayer and tell him, "You are suspected of fraud, and I am working on that"?

A. Oh, no, no. No, the Agents never tell a taxpayer that they suspect him of fraud, because there may not be any suspicion of fraud. There may be just suspicion, and there may not be any fraud there.

Q. So before the taxpayer is told, there must be something more than a suspicion? [18]

A. Yes.

Q. There must be a case actively in process, is that correct?

A. Yes. The matter of telling a taxpayer whether there is fraud, they usually don't learn that now until they are just down here ready to present it to the Grand Jury. That is one of the other grey areas. The taxpayer is most anxious to find out when the Government thinks there is fraud in the case, and they can't find out.

Q. At any time during the investigation by the Internal Revenue Agent is the taxpayer warned of his Constitutional rights that anything he may say

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

may be held against him, or his right to consult counsel, and the like?

A. Oh, yes, yes. That has been a practice universally followed, and I followed it. I think most of the men in my Group did; they cautioned them as to their rights, and they were certainly instructed to, because that was one of the situations that might make or break a case, on that very point.

Q. At what point would the taxpayer be so warned?

A. That is something that would depend on a particular case. I have done it immediately, and I have done it sometimes quite a bit later. You have to wait for an appropriate circumstance to do that. The Agent does not go in to a taxpayer and say, "I warn you of your rights, I am going to use it against you." No, he can't do that. [19]

Q. Would the taxpayer be informed that the man working on his books was a member of the so-called Fraud Group?

A. They were most anxious, and the tax counsel in a city like Los Angeles were most anxious to find out what Group the man was in, and if he was in Claypoole's Group, the Fraud Group, the tax counsel became very active immediately.

Q. But as a matter of fact, until a Special Agent entered the picture, the taxpayer would not necessarily know that there was a fraud case actually against him?

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

A. He does not know it even when the Special Agent is in the picture.

Q. You testified you have not known of an instance in which an Internal Revenue Agent has actually been threatened or has met with physical violence from the taxpayer. Were any other members of your Group authorized to carry firearms?

A. No.

Q. Didn't they carry firearms as part of their duty? A. No.

Q. Was it the responsibility of your Group to present matters to the United States Attorney for prosecution?

A. Actually it was a matter of rightful practice, the United States Attorney or a United States Attorney sought our agents to present cases to the Grand Jury, and [20] usually—Now, there are always of course exceptions, but I would say in my experience that usually the Revenue Agent presented the evidence, and I have appeared before Grand Juries from one end of this country to the other throughout the years, and in only two or three cases that I can recall now did a Special Agent appear, but the Revenue Agent that has done the work has to testify at first hand on the facts. That is the experience that we have.

Q. But the initial reporting to the United States Attorney that a crime has been committed or was suspected of being committed, was that a part of the duty of your group?

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

A. No. That is a procedural matter. It is not the Special Agent's business either. That is a special matter that goes to the Attorney General of the United States, where they take all these reports, the Special Agent's report and Revenue Agent's report; it goes to Washington and ultimately it ends in the Attorney General's office in Washington. The first procedure that I testified about was that in which the Commissioner wrote a letter authorizing and directed to the Revenue Agent to present the case to the United States Attorney.

Q. To what year are you referring?

A. That was back in the very early part.

Q. Will you take it chronologically, so we can get what the changes were? [21]

A. Yes, I will be glad to. That was in the early 20's. Then there was set up in Washington in the Chief Counsel's office a division, the title of which—I don't remember—the Penal Division, who were engaged on reviewing reports of the Special Agents and Revenue Agents. There was also set up a Special Adjustment Section in the Internal Revenue Bureau in Washington, this Special Adjustment Section, whose duty it was to examine and review carefully the technical details of all fraud cases. If the taxpayer requested it, or his counsel, conferences were held in Washington with the Penal Division and the Special Adjustment Section, whose duty it was to examine and review carefully the technical details of all fraud cases. If the taxpayer

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

requested it, or his counsel, conferences were held in Washington with the Penal Division and the Special Adjustment Division for hearing, and if the case was then found to be one where prosecution should be had, it was referred to the Attorney General, who in turn sent it to the United States Attorney in the particular district, and it was then presented to the Grand Jury. At that time it was the usual practice, at least in my experience, to call Claypoole as a witness to appear before the Grand Jury; and as I say, through the years there were only two or three experiences of my own in which Special Agents appeared.

Q. This was only up to 1947 or 1946?

A. This is through 1949.

Q. Through 1949? [22]

A. Well, now—oh, pardon me. I spoke out of turn. They set up about 1946—they decentralized this Washington arrangement and established here in San Francisco an office where the cases went there, where before they went to Washington. The purpose there was to do the work closer to home, because Washington was so far away for most people.

Q. Are you acquainted with instances in which the United States Attorney or Assistant United States Attorney has actually performed investigating work on a particular case, Mr. Claypoole?

A. Well, I have spent much time with Assistant United States Attorneys in these cases in one part

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

of the country and another, and I have never yet known of them to do any investigating work.

Q. Would your answer be any different if I were to tell you that I in a particular tax case have made numerous trips, in one case to another State, in order to develop and talk to witnesses and find documentary evidence?

A. I would commend you very highly for your industry.

Q. Are you acquainted with the action Mr. Cummins has brought in this case, Mr. Claypoole?

A. Only in a very vague way.

Q. I will state, before asking you the next question, that it is an action for a certain sum of money to him for declaratory relief, brought by Mr. Cummins against the United States, on the basis that the Department of the [23] Treasury and the Civil Service Commission have wrongfully denied him his rights to retirement under a certain statute known as 691B, Title V. Are you acquainted with that statute?

A. I have never read it. I have never even taken the time to look at it.

Q. In your opinion, does the outcome of Mr. Cummins' case have any bearing at all upon any retirement rights which you might have or claim against the United States?

A. It may have. I personally have no intention of doing anything about it, I am not interested in it. I put in many years in the Service, and I re-

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

tired, and I am now gainfully employed outside, and I have no interest in it whatsoever.

Mr. Lavine: That is all. Do you have any questions?

Cross Examination

Q. (By Mr. Machtinger): When an Internal Revenue Agent assigned to the Fraud Squad prepared his report after the conclusion of an investigation, did he make a recommendation specifically for or against criminal prosecution?

A. That was somewhat of an open question. Some did and some did not. It was a matter somewhat of the attitude [24] of the agent and what he thought of the case. We usually tried to leave that open, because we didn't want a conflict in recommendations.

Q. Isn't it true that his main responsibility in his report was to present his case as far as the deficiency is concerned in any civil 50 per cent fraud penalty that he may recommend or not recommend?

A. Yes.

When you say "civil fraud penalty," though, in a case where the Statute of Limitations is still open for criminal prosecution, where you have got a civil fraud case, you usually have a criminal case, and there was very little difference, and I don't know of anyone that has yet been able to distinguish the difference between what is civil fraud and criminal fraud in a given case, when the Statute of Limitations has not expired on criminal prosecution.

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

Q. But aside from the distinction between the two, was it not the responsibility of the Special Agent to make his recommendation for the criminal aspects of the case, and the responsibility of the Internal Revenue Agent to make his recommendation with respect to the deficiencies due from the taxpayer? A. That is right.

Q. Weren't there many cases when an Internal Revenue Agent not assigned to your group virtually completed a case in which he had discovered all of the facts necessary [25] to prove criminal fraud, at which time the case would then be transferred to your group?

A. I do not recall that. We had rather a strict rule over there about that situation, and if anyone discovered evidence of fraud, he usually contacted me personally just as quickly as he could, and we would take it from there. I am quite sure that never happened during my tenure.

Q. But you did testify that there were instances in which an Internal Revenue Agent of the Field Division who had completed a large portion of the work necessary for the audit aspects, and whom you considered to be a capable agent, was then assigned, I gather temporarily, to your Group for the completion of the case?

A. You said "a large portion of the audit." No. Usually when they found evidence of fraud and they came to me with a problem, if I felt that they were qualified to carry on, they were automatically

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

transferred into my group and under my supervision for that case, and frequently remained there forever after working on other cases.

Q. But there were Agents who did not remain and who after the completion of the case went back to their regular duties?

A. There were Agents who not only did not remain, but did not complete the cases, and we took them away from [26] them and gave them to an agent who could really do the job.

Q. Well, let me ask you, there were Agents who did complete the investigation with a Special Agent, and were then re-transferred to their duties?

A. That is right.

Q. Did an Internal Revenue Agent attached to your unit ever go ahead with a criminal investigation where the Special Agent stated in his opinion there was no criminal case, and refused to go ahead with it? A. No.

Q. If the Special Agent refused to go ahead with it, then the criminal aspects of the case were dropped, is that correct?

A. We didn't pursue the case beyond that, no.

Q. But the man assigned to your unit would continue with the investigation of the case, as far as the civil aspects were concerned?

A. We never had any cases like that over there during my time.

Q. Regardless of your personal feelings as to what was accomplished when you called in Special

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

Agents, it was nevertheless necessary to call in a Special Agent if you were going to fully investigate a taxpayer for criminal purposes, is that right?

A. It was necessary to call in a Special Agent to comply with the regulations and the directives. [27]

Q. You stated before, I think quite accurately, the chronological sequence of the investigation reports. Now, the Regional Counsel's office that was referred to by Mr. Lavine, is a branch of the Chief Counsel's office, is that right? A. Yes.

Q. And all that was accomplished by the change was decentralizing the functions that had been performed previously in Washington to the local offices? A. That was the intent.

Q. And isn't it true that no criminal case was ever commenced unless the Regional Counsel or the Chief Counsel concurred in their recommendation to the Department of Justice that an indictment be sought? A. Was commenced, you mean?

Q. Let me rephrase that. The Regional Counsel or Chief Counsel had the authority to kill a case at his level, is that right? A. Yes.

Q. Were you in the Los Angeles office when the so-called Racket Squad was organized?

A. No, sir.

Q. Do you recall when the position of Technical Advisor to the Regional Counsel was created?

A. Yes, sir.

Q. When was that? [28]

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

A. I can't recall the date. I remember the circumstances.

Q. Do you remember the year?

A. No, I do not. I am not exactly sure as to the year.

Q. That is all I am interested in right now.

A. But I remember the circumstances.

Q. You don't remember the year? A. No.

Mr. Machtinger: I think that is all. No more questions.

Mr. Lavine: I have no further questions.

Redirect Examination

Q. (By Mr. Mortenson): Mr. Claypoole, if a taxpayer made admissions which could be used by the Government in a prosecution, were such admissions made part of the Revenue Agent's report?

A. Yes, sir.

Q. Was it customary procedure to include in the Revenue Agent's report any incriminating admissions made by the taxpayer? A. It was.

Q. When the questions were asked about the audit features of a criminal investigation case, just what did [29] that include?

A. Let me get that question again.

(The question was read.)

A. well, I—

Q. Let me rephrase my question.

A. All right.

Q. When you answered the questions concerning

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

the audit features of a fraud investigation, what did you mean to include in the audit features?

Mr. Machtinger: Mr. Mortenson, are you referring to specific answers to specific questions?

Mr. Mortenson: Yes.

Mr. Machtinger: Could you be a little more specific as to the questions that you are referring to? I myself don't know, and I think Mr. Claypoole is puzzled also as to what questions you are referring to.

Mr. Mortenson: Mr. Reporter, will you read the question in which Mr. Machtinger asked about the audit features of a case being the responsibility of the Revenue Agent?

Well, let me ask the direct question instead, and that will solve that.

Q. The instructions to Internal Revenue Agents referred to audit features of a case being the responsibility of the Revenue Agent. What is your interpretation of the words "audit features," Mr. Claypoole? [30]

A. Well, my interpretation of the "audit features" of a case is that the Revenue Agent should have completed his investigation to the point where he could include in his report all matters pertaining to the tax liability of the taxpayer, and all evidence of the facts indicating either civil or criminal penalties, and do it in such a way that he would be prepared not only to present the matter to a Grand Jury, but to testify as a witness in a civil or

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

a criminal case, either before the Tax Court or the United States District Court.

Q. In addition to securing evidence which would be used in the actual tax computations, what further duties did the Revenue Agent have in a fraud classification?

A. He had the duty of gathering of evidence to support the conclusion that is set out in his report, all the auditing features in an income tax investigation, every bit of evidence that was closely related to the audit features of the case.

Mr. Mortenson: No further questions.

Mr. Lavine: No further questions.

Mr. Machtinger: No questions.

(It was stipulated and agreed by and between counsel that the foregoing deposition shall be signed before any Notary Public, with the same [31] force and effect as though read and signed in the presence of the Notary Public before whom it was taken.)

/s/ PARIS B. CLAYPOOLE,
Signature of Witness.

Subscribed and sworn to before me, this 16th day of October, 1956.

[Seal] /s/ ELSIE GALE,
Notary Public in and for the County of Los Angeles, State of California. [32]

[Endorsed]: Filed October 19, 1956.

PLAINTIFF'S EXHIBIT No. 2

[Title of District Court and Cause.]

DEPOSITION OF VINCENT B. MURPHY

taken on behalf of the plaintiff, at Suite 625, Federal Building, Los Angeles, California, commencing at 10:00 o'clock a.m., Wednesday, October 10, 1956, before Charles C. Jenkins, CSR, Notary Public, pursuant to the annexed Stipulation.

Appearances of Counsel: For the Plaintiff: Ernest R. Mortenson, Esq. For the Defendant: Laughlin E. Waters, United States Attorney, Max E. Deutz, Assistant United States Attorney, Chief of Civil Division, by Richard A. Lavine, Assistant U. S. Attorney and Sidney J. Machtinger, Special Attorney, Internal Revenue Service. [1]*

VINCENT B. MURPHY

having been first duly sworn, deposed and testified as follows:

Direct Examination

Q. (By Mr. Mortenson): Mr. Murphy, will you state your name? A. Vincent B. Murphy.

Q. And what is your business or occupation?

A. Internal Revenue Agent.

Q. Are you also a Group Supervisor?

A. I am Supervisor of Group No. 7.

Q. And where is your office located?

A. In the Federal Post Office and Courthouse in Los Angeles.

* Page numbers appearing at top of page of Original Deposition.

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Q. When were you made Supervisor of Group No. 7? A. October 2, 1949.

Q. On inter-office communications, what is the name usually given to Group No. 7?

A. Fraud Group.

Q. Before you were named Group Supervisor of the Fraud Group, what were your duties in the Internal Revenue?

A. Internal Revenue Agent in the Fraud Group.

Q. When did you first become acquainted with Oren E. Cummins? [2]

A. When I first came to California as an agent on January 2, 1938.

Q. What position did Mr. Cummins hold in 1938, if you recall?

A. He was an Agent in the Fraud Group, under the supervision of Mr. Warner E. Williams.

Q. Were you a Revenue Agent in the Fraud Group in 1938? A. I was.

Q. When you became Group Supervisor on October 2, 1949, what position did Mr. Cummins hold?

A. He was still a Revenue Agent in the Fraud Group.

Q. Do you recall when Mr. Cummins retired from the Service? A. December 31, 1954.

Q. Mr. Murphy, would you explain generally the functions of a Revenue Agent and the functions of a Special Agent during the time they conduct a joint investigation for fraud?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. Well, first of all, some cases originated, some allegational fraud cases originated in our Group, the Fraud Group, and some originated in the Special Intelligence Unit. If they originated in the Fraud Group, the Agent would make his investigation up to a point where he would have indications of fraud.

Q. Pardon me. By "Agent" you mean Revenue Agent? [3]

A. Revenue Agent. At that time he was instructed to cease operations and ask for the cooperation of a Special Agent. If the case was accepted for joint investigation by the Special Agent, they would then work together, the Revenue Agent and the Special Agent would work together to carry the case through to completion. At the end of the examination, the Special Agent would then submit the case with his recommendations as to whether he thought criminal action should be taken.

Q. During the investigation, roughly what were the duties of the Revenue Agent?

A. The Revenue Agent's duties were the audit features of the case. The Special Agent's duties were to procure evidence for criminal prosecution.

Q. By "evidence for criminal prosecution" do you mean evidence relating to the element of criminal intent, mainly? A. Yes.

Q. During the conduct of a joint investigation, speaking about the period when Mr. Cummins was a Revenue Agent in your Group did the Special

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Agent have any authority to order a Revenue Agent to do any particular act?

A. Well, that is a question. According to the rules and regulations, the Special Agent was supposed to be in charge of the investigation, but the Revenue Agent was supposed to be in charge of the audit features of the case, [4] so I don't think it has ever been definitely decided who was the boss, and that is a question that has been brought on as long as I can remember.

Q. Did the Special Agent have any disciplinary powers of any kind over the Revenue Agent?

A. Not that I know of.

Q. To whom did the Revenue Agent answer, insofar as supervision was concerned?

A. To his Supervisor in the Fraud Group.

Q. To whom did the Special Agent answer, insofar as authority and discipline was concerned?

A. To the Chief Special Agent.

Q. At the time that Mr. Cummins was a Revenue Agent, did the Special Agent in Charge and the Revenue Agent in Charge have a common Supervisor, or were their Supervisors independent of each other?

A. Well, at that time the only common Supervisor they had would be the Commissioner in Washington.

Q. The line of authority for the Special Agent proceeded in what way?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. I think it was direct from the Commissioner in Washington.

Q. Is it true that a Special Agent would report to the local Special Agent in Charge, and the local Special Agent in Charge would report to the head of the Intelligence Unit in Washington, who in turn was responsible to the [5] Commissioner?

A. That is the way I understand it, yes.

Q. In actual practice, in the investigation of a fraud case is it possible to divide duties into criminal and non-criminal features?

A. During the investigation, I would say no; but at the termination of the investigation, there would be certain items on which they would have sufficient evidence for criminal prosecution, and other items would be just technical.

Q. Under the rules and regulations in force during Mr. Cummins' tenure, was it possible for the Special Agent to make a recommendation of prosecution without the report of a Revenue Agent?

A. No. At that time the Revenue Agent was charged with the duties of submitting——

Mr. Machtinger: At what time? Will you specify what time?

Mr. Mortenson: My question was asked during Mr. Cummins' tenure.

Mr. Machtinger: The entire time of his tenure?

Mr. Mortenson: Yes.

The Witness: The Revenue Agent is charged with the duties of preparing a confidential report,

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

which is supposed to contain all the evidence necessary for the assertion of the 50 per cent civil penalty. That report was then submitted to the Special Agent, who in turn prepared [6] his own report as to the criminal portion of the case.

Q. What was usually presented as Exhibit No. 1 to the Special Agent's report?

A. The Revenue Agent's report.

Q. Is it true that all indictments brought for evasion of tax allege an amount of tax that has been evaded?

A. No, just those portions which you are able to prove criminal intent on.

Q. In the indictment is there always an allegation concerning a specific amount of tax which has been evaded? A. I think so.

Q. Under the rules and the regulations who computed the figures for such an amount which was stated in the indictment?

A. Well, up to the time I think they formed a Technical Advisor to the Regional Counsel, I think that was done by the Revenue Agent; but after the appointment of a Technical Advisor to the Regional Counsel, I think it was his duty to compute the tax.

Q. As between a Revenue Agent and a Special Agent, whose duty would it be to compute the tax which would be stated in the indictment?

A. Well, it was always the duty of the Revenue Agent to compute taxes.

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

Q. In your duty as a Group Supervisor of the Fraud Group, and as an Internal Revenue Agent investigating [7] fraud cases, do you recall any criminal prosecution in which a Revenue Agent did not take part in the investigation, where the indictment was for evasion of taxes?

A. Yes. Deputy Collectors at time worked up fraud cases.

Q. Except then for Deputy Collectors who did the same work as a Revenue Agent, were there any cases of prosecution without an investigation by either a Revenue Agent or a Deputy Collector?

A. Not for income tax evasion.

Q. In a joint investigation for fraud as between a Special Agent and a Revenue agent, which generally spent more time with the taxpayer, his associates and his employers?

A. Well, the Revenue Agent would have to spend more time, because he had to make the audit of the case.

Q. In the ordinary fraud case, where there is a joint investigation, who generally had the first personal contact with the taxpayer, as between the Revenue Agent and the Special Agent?

A. Prior to January 1, 1955, it was generally the Revenue Agent. Since January 1, 1955, the new mimeographed 55-19 states that preliminary investigation shall be made by the Special Agent, at which time he usually contacts the taxpayer.

Q. When Mr. Cummins was a Revenue Agent

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

under your supervision, what group handled the so-called "racketeer [8] cases"?

A. A special group was formed to handle racketeer cases. I think it was about 1950 it was put under the supervision of Mr. Raymond Maddocks.

Q. Prior to the organization of this Racket Squad, and since it was dissolved, what group handled the so-called racketeer cases?

A. Group No. 7, the Fraud Group.

Q. Was Mr. Cummins during the time he was under your supervision assigned any so-called "racketeer cases"? A. Yes.

Q. Mr. Murphy, we do not wish to have any of these names entered in the record, but it is permissible, I believe, for you to refer to the individuals in a way in which they may not be identified. I hand you a list of names, and ask you whether you have seen this before.

A. Yes, I have.

Q. Was that during the period when Mr. Cummins was seeking retirement?

A. That particular list was after Mr. Cummins had retired.

Q. And what does that list represent?

A. It purports to represent cases worked by Mr. Cummins while he was a member of the Fraud Group.

Q. And as far as you know, did he investigate the cases listed on these pages? [9]

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. From 1949 on I know to my knowledge that he did investigate all of those cases.

Q. Now, these names are listed under years, is that correct?

A. That is correct. It lists 1949, 1950, 1951, 1952, 1953 and 1954.

Q. In how many of the cases here were the taxpayers suspected of committing criminal fraud?

A. I think in all cases.

Q. What proportion assigned to Mr. Cummins when he was under your supervision were cases in which the taxpayers were suspected of committing criminal fraud?

A. I think all cases that were assigned to Mr. Cummins by me were potential fraud cases.

Q. By that do you mean that there was a suspicion that the taxpayers could have committed criminal fraud against the United States?

A. That's right.

Q. Now, without mentioning any names, do you find on this list the names of individuals who were considered racketeers or questionable characters?

A. Yes, quite a number of them.

Q. Mr. Murphy, was there at a time a list circulated in the Internal Revenue Service, then known as the Bureau of Internal Revenue, which purported to contain names of racketeers? [10]

A. Well, there was a list made up of suspected racketeers when the Racketeer Group was formed. That is the only list I know.

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Mr. Lavine: That is in 1950?

The Witness: 1950.

Q. (By Mr. Mortenson): Do you know whether Mr. Cummins had personal contact with individuals who had been classified as possible racketeers?

A. Well, they hadn't been classified up to the time the Racketeer Group was started, but we considered them such.

Q. That is, taxpayers investigated by Mr. Cummins were deemed by you to be racketeers?

A. Yes, and by "racketeers" we considered gamblers and other persons in the criminal element.

Q. Mr. Murphy, will you say that Mr. Cummins was exposed to danger more than, the same as, or less than the Special Agents who cooperated with him in criminal fraud investigations?

A. Well, if you base that on an element of time working on the case, I would say that Mr. Cummins worked longer on the cases as a rule than the Special Agents, and if the Special Agent was open to any acts of violence by the taxpayer, I would think that Mr. Cummins was open to the same danger.

(A short recess was had.)

Q. (By Mr. Mortenson): Mr. Murphy, in the ordinary [11] investigation of a criminal case, is it necessary for the Revenue Agent to examine some or all of the books and records of the taxpayer?

A. When he can get them, yes; but there are

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

lots of cases where we cannot get any books and records of the taxpayer.

Q. Is it ordinary procedure to attempt to inspect the books and records of the taxpayer?

A. Yes.

Q. And whose function is it to make such an inspection? A. The Revenue Agent.

Q. Mr. Murphy, do you know when the Intelligence Unit, now known as the Intelligence Division, became a part of the Treasury Department?

A. I understand it was in 1919.

Q. Was that at the time when Mr. Elmer Irey and five other Post Office Inspectors transferred to the Treasury Department?

A. That is what I am told.

Q. Mr. Murphy, do you know whether it was a crime to evade taxes prior to 1919?

A. I think it was made a crime in 1919. Prior to that it was a misdemeanor.

Mr. Machtinger: Testify personally from your own knowledge, just what you know.

The Witness: Then I can answer that and say I don't [12] know.

Mr. Mortenson: That is all I have. Do you have any cross-examination, Mr. Lavine and Mr. Machtinger?

Cross Examination

Q. (By Mr. Lavine): In reference to the questions and your answers concerning the so-called Fraud Squad activities, with the exceptions that

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

you listed, giving some cut-off dates, 1950 and 1954 and 1955, do your answers cover the entire period of service which Mr. Cummins claims to have rendered?

Before I make that into a question, I will give you some little more definite questions along that line.

As I understand Mr. Cummins' case, he lists activities from the years 1928 to 1953, inclusive, or some parts of those years. Now, in your answers heretofore, when you have described activities of the Fraud Squad, do you also refer to the periods prior to your coming to California?

A. No.

Q. In other words, your testimony only relates to the period in your personal knowledge?

A. That is right.

Q. Mr. Murphy, you described the duties of one category of Internal Revenue Agents, namely, members of the so-called Fraud Group. Prior to the time of retirement of Mr. Cummins, which was January 31, 1954, what other [13] categories were there of Internal Revenue Agents?

A. Well, there was the regular Field Agent, who made the ordinary examination.

Q. What were his duties in the group?

A. Well, he would investigate returns given him for examination, and if he should find any indications of fraud, he would immediately stop his ex-

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

amination and transfer them over to the Fraud Group for consideration.

Q. Let's go through a typical case. Supposing I am under investigation—I as an individual, not as an Assistant U. S. Attorney. Let us suppose that an audit has been made by an Internal Revenue Agent attached to the Field Unit, say Internal Revenue Agent Smith. Supposing he has made a rather complete audit of my activities over a couple of years in question and finds or suspects there is a fraud. What happens then? Is his audit turned entirely over to the Fraud Squad, or what happens?

A. At the time Mr. Cummins was with us, if any Agent found indications of fraud, they would be submitted to the Fraud Group for consideration, and if we thought that there was sufficient indication of fraud, we would then ask for a joint investigation with a Special Agent.

Q. Who would then work with the Special Agent, the original Field Unit man?

A. No, he would transfer the case to the Fraud Group, and one of the Fraud men would go after the suspect. [14]

Q. In normal circumstances would the original agent have anything further to do with the case?

A. No.

Q. Not even in a situation where he had a substantial amount of work and made extensive notes?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. No, I don't ever know of an agent that has worked in the field in a fraud case.

Q. In other words, was Mr. Cummins assigned to this so-called "Racketeer Squad" during his tenure of duties? A. No.

Q. Mr. Murphy, I show you a copy of a document which is attached to a file marked "Certified and Corrected Copies of Official Documents," contained in the retirement file of Oren E. Cummins. I am not going to introduce this in evidence, because it is going to be introduced in evidence later, Mr. Murphy. I would like you to read that page and tell me whether that page is a job description, including tasks and performance standards of an Internal Revenue Agent GS-12 assigned to the Fraud Group during your term as head of that Group. Incidentally, for the purpose of referring to this, this is Exhibit E to the sheaf of documents that I have just mentioned.

Mr. Mortenson: Yes, and for further identification, it has the ending, "Internal Revenue Agent, GS-12, Assigned to Fraud Group," with signature at the bottom, "Vincent B. Murphy, Group Chief," dated 6-15-1951, with the name "Oren [15] E. Cummins, Agent," at the bottom.

Mr. Lavine: In view of the length of the question, and Mr. Mortenson's remarks, I will reframe my question.

Q. Does that page, this sheet, set forth job description, including task and performance stand-

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

ards of Mr. Cummins, as a member of the Fraud Group?

A. It does. You said this bore my signature and the signature of Cummins. This is just a copy, with the signatures typed in.

Q. For the purposes of identification, I show you the original of which this purports to be only a certified copy of the original. The copy that I have shown you appears to be a true copy, does it not? A. It appears to be, yes.

Q. Now, as part of the duties of members of the Fraud Squad, are they authorized by law or by regulation or by custom to issue or carry firearms? A. No, sir.

Q. Do they as a matter of course carry or possess firearms? A. No, sir.

Q. Now, with reference to the degree of risk run by members of the Fraud Group, during your tenure of office were any members of your Group shot at or assaulted with deadly weapons?

A. I don't know of any Agent or Special Agent that was [16] assaulted or shot at.

Q. Approximately how many years, Mr. Murphy, have you been engaged in activities in or comparable to the Fraud Group type of work?

A. Eighteen years.

Q. Are you aware of the nature of the case brought by Mr. Cummins? A. I am.

Q. In the event that Mr. Cummins should be successful in this case, would not the outcome of

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

this case serve as a precedent which would bear some possible relationship to your retirement rights? A. It is possible.

Q. With reference to the conduct of a fraud investigation case, as I understand it, Mr. Murphy, there are two parts or elements that must be established in a criminal fraud case, are there not; and those two elements may be broadly defined as the audit features of the case and the feature of establishing criminal intent? A. That is right.

Q. Is that a fair division? A. Yes, sir.

Q. In the initial part of the investigation, whether it be for fraud or otherwise, does not the Internal Revenue Agent conduct the audit feature of the case? A. Those are his duties. [17]

Q. And at some time during pursuit of that audit investigation, he may or may not discover something which causes him to suspect fraud, or which involves a criminal intent; is that correct?

A. That is right.

Q. And at that time he makes his initial report, and report of suspicions through channels to the Intelligence Unit, is that also correct?

A. That is true as far as the regular Field Group is concerned, but in the Fraud Group we usually went farther than that.

Q. Would you elaborate on that, please?

A. We even went so far as to get evidence which was later given to the Special Agent as a part of the criminal action.

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

Q. In relation to what features of the case?

A. Any evidence which we found during the course of an audit; or lots of times we would find documents in the taxpayer's files which would be very valuable in the criminal case, and we would have those photostated, so that we would have them when they were necessary.

Q. In other words, the Internal Revenue Agent didn't close his eyes to the criminal intent features, but what he discovered he would turn over to the Special Agent?

A. Yes, or he would include them in his confidential report lots of times, and the Special Agent would get a copy [18] of it.

Q. Now, during the meeting in respect to the taxpayer, an Internal Revenue Agent examines his returns, his books and records, and makes an audit in the normal course of affairs. Isn't there a specific time in which the taxpayer realizes that a Special Agent has been called into the case?

A. Usually when the Special Agent shows up in his office and tells him he is from the Intelligence Unit.

Q. Isn't that normally the first time that the taxpayer realizes that he faces a potential criminal suit?

A. Yes, I would say so.

Q. And it is normally at that point that the taxpayer has real cause for alarm that a suit is very possibly in the offing, is that right?

A. Yes.

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Q. So prior to that time, so far as the taxpayer is normally concerned, he hopes everything is going along smoothly, and he has nothing to worry about; is that correct?

A. Well, that depends on what kind of a conscience he has got.

Q. Well, prior to that time he has no special reason to believe that the Internal Revenue Agent is looking for or pointing at fraud, does he?

A. No, sir.

Q. Have you had occasion to work on any cases with a U. S. Attorney or the U. S. Attorney? [19]

A. Yes.

Q. And during the investigation of those cases, has it been a fact that the Assistant U. S. Attorney assigned the case has himself actively worked at finding evidence, such as examining witnesses and going out and looking at documents?

A. Yes, sir.

Q. Going out to banks and looking at records in some cases?

A. Well, usually they call for the Revenue Agent to go out and get copies of the records.

Q. In other words, the Internal Revenue Agent is the "leg man," to use the slang expression. But so far as the development of a case, has it been your experience an Assistant U. S. Attorney has in cases where it is necessary to further develop the case, performed certain of the duties that normally would be those of the Special Agent?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. Yes, sir.

Q. And some of the duties which fall in the purview of the Internal Revenue Agent?

A. Sometimes, yes.

Q. Now, is there a Division of the Internal Revenue Service which passes upon the sufficiency and legality of a criminal fraud case?

A. Yes, sir; the Regional Counsel's office.

Q. To your knowledge, what sort of work is done by the Regional Counsel's office in this case?

A. Well, they prepare the case for trial and line up the witnesses, and see that the evidence is sufficient to uphold the criminal charges.

Q. In your experience, in certain cases have members of the Regional Counsel's Office, in cooperation with the Internal Revenue Agent, Special Agent, performing some of the duties of investigation, overlapped those of the duties of the Internal Revenue Agent?

A. At times when the evidence is not clear, they will ask for verification and ask for additional evidence.

Q. And have they had occasion to interview some of the potential witnesses? A. Yes, sir.

Q. And criminal fraud cases? A. Yes, sir.

Q. And to interview the taxpayer in some cases, when appropriate? A. Yes, sir.

Q. Perhaps to go out to the taxpayer's premises on occasion?

A. Well, I don't know whether they go out to

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

the taxpayer's premises, but I know they have interviewed taxpayers.

Q. Suppose there is a situation, Mr. Murphy, where the Internal Revenue Agent has reported fraud, and the Special Agent has been called into the case, the Special [21] Agent has done a certain amount of investigation. Can the Internal Revenue Agent proceed with the development of a fraud case if the Special Agent says no, or refuses to acquiesce in a report recommending fraud?

A. As far as criminal action is concerned, why, when the Special Agent says he will not recommend it, there will be no criminal action; but the Revenue Agent then has to write a confidential report to uphold the 50 per cent fraud penalty.

Q. Is that true of all Internal Revenue Agents involved in a proper case, and not limited to members of the Fraud Squad? A. That is right.

Q. The Fraud Group? A. That is right.

Q. In a case where an ordinary, garden-variety Internal Revenue Agent finds evidence in a criminal case, doesn't he also submit such evidence or a summary of such evidence in his report to his superior?

A. He writes an information report giving in detail all that he has found during the course of his investigation.

Q. Which may include evidence which would point toward a criminal case?

A. That is right. Maybe I should qualify that

Plaintiff's Exhibit No. 2—(Continued)

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last statement as to the 50 per cent penalty. Prior to the mimeographed 55-19, fraud cases were always worked in the [22] Fraud Group. If a Special Agent turned them down for prosecution, we would continue on in the Fraud Group to finish the case. Those were the old regulations. Under the new regulations, if the Special Agent turns them down, they go direct to the Field. That is since January 1, 1955.

Q. Mr. Murphy, I will read to you now Section 4566.1 (1) of the Internal Revenue Manual, which provides, and I quote:

“Responsibility in all full-scale investigations for the development of evidence and for recommendations pertaining to the potential criminal features of the case and the ad valorem additions to the tax for civil fraud, negligence, or delinquency (excepting those concerning the tax estimations), shall be that of the Special Agent unless and until he withdraws from the case. He will be responsible for the method of procedure and conduct of the investigation. The cooperating officer will be responsible for the audit features of the case. The Internal Revenue Agent will also be responsible for taking any action necessary to protect the interests of the Government in respect to the statutory period for assessment.” [23]

Are you familiar with that regulation?

A. That regulation came out when 55-19 was put into effect on January 1, 1955.

Plaintiff's Exhibit No. 2—(Continued)

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Q. And prior to that time did matters contained in that regulation cover the respective duties of the Special Agent and Internal Revenue Agent assigned to a case? A. In general, yes.

Mr. Lavine: That is all.

Mr. Machtinger: I would like to ask a question to clarify a point.

Cross Examination

Q. (By Mr. Machtinger): I think you said that prior to 55-19 the Internal Revenue Agent attached to Fraud would continue the investigation, even though the Special Agent had turned it down for criminal purposes? A. That is right.

Q. You mean, of course, he would continue in the civil aspect, and that included the 50 per cent civil fraud penalty? A. Yes.

Q. But no longer the criminal aspect of the case? A. No, sir.

Q. One other question with reference to a question [24] Mr. Lavine asked you:

After a Special Agent comes out, it is at that time that the taxpayer is first fully aware there is an investigation for criminal purposes, isn't that right? A. I think so, yes.

Q. And isn't it true the taxpayer understands the different functions of the Internal Revenue Agent, who may or may not be attached to the Fraud Squad, and the Special Agent, that the Special Agent is there for the criminal aspect of it?

Plaintiff's Exhibit No. 2—(Continued)
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A. I don't think the general public know much about the duties of agents.

Q. When the Special Agent is called out and is assigned to the case, isn't the taxpayer then advised of his rights, as far as the criminal features go, and possible prosecution?

A. He is supposed to be, yes.

Q. Until that time he isn't advised of that phase of the case, that possibly he may incriminate himself in particular documents and certain other aspects of the criminal investigation?

A. No, sir.

Q. So far as the primary responsibility between the Special Agent and the Internal Revenue Agent, it is clear between the two of them, isn't it, that the primary responsibility of the Special Agent is for the criminal [25] aspect, and the primary responsibility of the Revenue Agent attached to the Fraud Squad is for giving such technical advice in respect to the audit features as the Special Agent may require or request?

A. That is true.

Mr. Machtinger: I don't have any further questions.

Mr. Lavine: No further questions.

Redirect Examination

Q. (By Mr. Mortenson): Mr. Murphy, does the fact that you might possibly be affected by the results of this action in the Federal Court have

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

any influence on the answers to the questions you have given today, or will give? A. No, sir.

Q. Now, Mr. Murphy, assume that a Special Agent has been assigned to a case, and the taxpayer has been warned of his Constitutional rights; does the Revenue Agent still pursue his work in the matter of investigating the case? A. Yes, sir.

Q. So that the questions relating to the knowledge of a taxpayer that he is suspected of crime, or his lack of knowledge, would relate to the preliminary investigation, would it not?

A. That's right. [26]

Q. Now, assume we have a situation where there is a double set of books, one of which corresponds to the figures on the tax returns, and the other one showing the actual results of business operations, which I consider to be an ideal fraud situation from the Government's standpoint; who normally would testify in court as to the contents of the books and records and the consequences of the double set of books? A. The Revenue Agents.

Q. Who would be the one, as between the Revenue Agent and the Special Agent, who would secure the books, audit the books, and make a report on such before the case goes to the United States Attorney's office?

A. During the years in question the Revenue Agent, who is usually the first man on the scene.

Q. Now, Mr. Murphy, some questions have been asked about the criminal features and the non-

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

criminal or audit features of an investigation. Would you classify the work in connection with examining a double set of books a criminal feature or a non-criminal feature of the investigation?

A. The examining of the books?

Q. Yes.

A. Well, I would think if you find two sets of books, and one is false, that that is part of the evidence that is going to be needed for criminal prosecution.

Q. That would be evidence of criminal intent, would it [27] not? A. I would think so.

Q. And it would be the duty of the Revenue Agent to conduct the examination in that regard, is that correct?

A. It is his duty to make an audit of all records.

Q. Do you know of any instances during the time that Mr. Cummins was a Revenue Agent, in which he had practically completed the investigation before a Special Agent was called in?

A. I think there were several cases like that.

Q. With regard to investigations conducted by Assistant United States Attorneys, in your experience what proportion of the evidence used in court would be developed in such manner?

A. Well, I don't know of any case where the evidence was developed. They asked for clarification of evidence or further evidence to prove that evidence. Of course, the duty of a Special Agent

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

was to procure evidence, and there may be cases where they call the Special Agent in.

Q. With regard to the function of the Regional Counsel's office in processing fraud cases, what portion of the evidence, in your experience, would be developed in that office after the case was referred to the Regional Counsel?

A. Well, that I couldn't answer definitely, because I wouldn't be apprized of what the Regional Counsel was [28] doing.

Q. Regarding the fact that a Special Agent is instructed to warn the taxpayer of his Constitutional rights, and the Agent asks for what might be privileged evidence subsequent to that, does the Revenue Agent usually have contact with the taxpayer? A. Definitely.

Mr. Mortenson: That is all I have.

Mr. Machtinger: May I ask another question or two?

Recross Examination

Q. (By Mr. Machtinger): After the completion of a joint investigation by the Special Agent and the Internal Revenue Agent, does the Internal Revenue Agent write a report which includes a special recommendation as to criminal prosecution?

A. No, sir.

Q. Isn't it only the Special Agent's report which recommends for or against criminal prosecution?

A. Yes, sir.

Q. And that Special Agent's report, if it is ap-

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

proved, is referred to the Regional Counsel's office, is that correct? A. That is correct.

Q. And no criminal prosecution is commenced unless [29] the Regional Counsel recommends criminal prosecution be commenced against the taxpayer? A. That is right.

Q. So in considering whether there shall or will be criminal prosecution against the taxpayer, the Internal Revenue Agent's report plays no part in the criminal aspects of the case?

Mr. Mortenson: Just a minute.

Mr. Machtinger: I will withdraw that. No further questions.

Mr. Lavine: No further questions.

Redirect Examination

Q. (By Mr. Mortenson): I don't know whether this is a question which you can answer, Mr. Murphy, but do you know whether it would be the duty of a Revenue Agent to report evidence of a crime against the Revenue Act to the local United States Attorney, in the event a Special Agent arbitrarily refused to recommend prosecution?

Mr. Machtinger: May I ask Mr. Mortenson to define the word "duty," whether it is duty within the scope or functions of the employee, or duty as a citizen?

Mr. Mortenson: I intended that to mean a statutory duty. [30]

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Mr. Machtinger: As distinguished from a duty within the scope of the employment of the Internal Revenue Agent?

Mr. Mortenson: No, in connection with his employment as an Internal Revenue Agent. That is a matter of law, and probably is an improper question.

Mr. Machtinger: Do you withdraw the question? If not, I think we should object to it, because I don't think a witness such as Mr. Murphy could testify with reference to——

Mr. Lavine: Well, of course any objections are reserved until the time of trial.

Mr. Mortenson: No further questions.

Mr. Lavine: No further questions.

/s/ VINCENT B. MURPHY,
Signature of Witness.

Subscribed and sworn to before me this 17th day of October, 1956.

[Seal] /s/ VOLNEY V. BROWN, JR.,
Notary Public, County of Los Angeles, State of
California.

[Endorsed]: Filed October 19, 1956.

PLAINTIFF'S EXHIBIT No. 3

United States Civil Service Commission

Washington 25, D. C.

October 10, 1956

Address Only "Civil Service Commission." In
Your Reply Refer to File BAR:EPT:rsp, and
Date of This Letter CSA-380 606.

Airmail

Mr. Oren E. Cummins

918 Encanto Drive

Arcadia, California

Dear Mr. Cummins:

Your appeal to the Commission from the determination by the Retirement Division that your application for benefits under Section 1 (d) of the Civil Service Retirement Act may not be accepted has been referred to this Board for final decision.

The Board of Appeals and Review has made a study of the facts in your case. Section 1(d) of the Retirement Act provides that any officer or employee to whom this Act applies the duties of whose position are primarily the investigation, apprehension or detention of persons suspected or convicted of offenses against the criminal law of the United States (including any officer or employee engaged in such activity who has been transferred to a supervisory or administrative position) who is at least 50 years of age, and who has rendered 20 years of service or more in the performance of

Plaintiff's Exhibit No. 3—(Continued)

such duties (including the duties of a supervisory or administrative officer or employee) may on his own application and upon the recommendation of the head of the department or agency in which he is serving and with the approval of the Civil Service Commission retire under the provisions of this Section. Recommendation of the head of the department or agency in which the employee is serving is required and since the Treasury Department has not submitted such recommendation the statutory provisions of Section 1(d) of the Act preclude the acceptance of your application for benefits thereunder. Accordingly, the decision reached by the Retirement Division in your case is affirmed.

For the Commissioners:

Sincerely yours,

/s/ JOHN E. BLANN,

John E. Blann, Chairman,

Board of Appeals and Review.

PLAINTIFF'S EXHIBIT No. 4

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to A:PT:PO.

May 2, 1955

Mr. O. E. Cummins
918 Encanto Drive
Arcadia, California

Plaintiff's Exhibit No. 4—(Continued)

Dear Mr. Cummins:

Commissioner Andrews has asked me to reply to your letter of April 11, 1955, concerning your eligibility for retirement under Section 1(d) of the Retirement Act.

You have no appeal to the Civil Service Commission since retirement under Section 1(d) must be recommended by the head of the agency. It is not a right to which an employee becomes entitled by virtue of specific service but is discretionary with the Secretary of the Treasury.

Your case has received careful consideration but evidence has not been presented to conclusively prove that you performed the duties of a Special Agent, which is a position approved for coverage under Section 1(d). Therefore, we have no basis for ruling favorably on your appeal.

Your final appeal is to the Director of Personnel, Treasury Department. In your letter of March 21, 1955, you stated that you have information that Revenue Agents have retired under Section 1(d). In order that we may have the file complete, please furnish us with the names of these Revenue Agents. When we have this information, we will submit the entire file to the Treasury Department.

Very truly yours,

/s/ M. LATHAM, JR.,

(Acting) Director, Personnel
and Training Division.

PLAINTIFF'S EXHIBIT No. 5

U. S. Treasury Department

Washington 25

February 7, 1955

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to A:PT:PO.

Mr. Oren E. Cummins

918 Encanto Drive, Arcadia, California

Dear Mr. Cummins:

This refers to your letter concerning your eligibility for retirement under Section 1(d) of the Retirement Act.

The Treasury Department negotiated with the Civil Service Commission a list of positions approved for inclusion under Section 1(d). The duties of such positions had to be within the scope of standards furnished by the Civil Service Commission. The position of Internal Revenue Agent, GS-512, in the Audit Division has not been approved for coverage; the position of Special Agent (Tax Fraud), GS-1811, in the Intelligence Division is, however, covered.

As you requested, I am enclosing a list of the positions which have been approved by the Civil Service Commission.

Very truly yours,

/s/ M. J. FLATTERY,

M. J. Flattery, Chief, Placement Branch, Personnel and training Division.

Enclosure

PLAINTIFF'S EXHIBIT No. 6

U. S. Treasury Department

Washington 25

April 5, 1955

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to A:PT:PO.

Mr. O. E. Cummins
918 Encanto Drive
Arcadia, California

Dear Mr. Cummins:

This refers to your letter of March 21, 1955, addressed to Commissioner Andrews, with enclosures, concerning your desire to establish creditability of service for retirement under Section 1 (d) of the Retirement Act.

It is mandatory that an employee occupy a position approved for coverage under Section 1(d) at the time he retires in order to have his annuity computed under its provisions. If an employee occupying a covered position needs time spent on detail from an uncovered position to a covered position to make up the necessary twenty years, such time spent on detail is creditable if properly documented.

Since the position of Internal Revenue Agent, which you occupied at the time you retired, is not approved for inclusion under Section 1(d), you are not, in any case, eligible to have your retirement annuity computed under the provisions of

Plaintiff's Exhibit No. 6—(Continued)

this Section. I am sorry, but we are unable to take any action in your case.

Very truly yours,

/s/ M. J. FLATTERY,

M. J. Flattery, Chief, Placement Branch, Personnel and Training Division.

PLAINTIFF'S EXHIBIT No. 7

(Copy)

PENALTY CASES

Page 8

Especially in fraud cases the investigation should be thorough and complete in every detail and the examining officer should arm himself with knowledge of every phase of the case for the further reason that he should be prepared to be an intelligent witness for the Government in the event of subsequent litigation, either in a civil trial before the Board of Tax Appeals in connection with the determination of penalty liability or in a criminal trial before the United States Federal Courts.

[Endorsed]: No. 16005. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Oren E. Cummins, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 7, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16005

UNITED STATES OF AMERICA, Appellant,

vs.

OREN E. CUMMINS,

Appellee.

STATEMENT OF POINTS

Appellant, the United States of America, will rely upon the following points in its appeal in the above case:

1. The district court erred in granting a money judgment for appellee for monies allegedly due him under the provisions of 5 U.S.C. 691(d).

2. The district court erred in holding that appellee at the time of his retirement had satisfied all of

the requirements for retirement under 5 U.S.C. 691(d).

3. The district court erred in holding that appellee is entitled to have his annuity computed under 5 U.S.C. 691(d).

4. The district court erred in holding that the refusal of the Secretary of the Treasury and the Civil Service Commission to grant appellee's retirement under 5 U.S.C. 691(d) was due to an erroneous interpretation of that Section.

5. The district court erred in holding that in the performance of his duties appellee was subjected to a degree of hazard as great or greater than the degree of hazard to which the Special Agent with whom he conducted investigations was subjected.

6. The district court erred in holding that appellee was subjected to a degree of hazard contemplated by 5 U.S.C. 691(d).

7. The district court erred in failing to dismiss the action for lack of jurisdiction.

8. The district court erred in holding that the Secretary improperly refused to recommend appellee for retirement under this Section.

9. The district court erred in holding that the Civil Service Commission improperly denied appellee retirement benefits under 5 U.S.C. 691(d).

10. The district court erred in holding that the Secretary of the Treasury and the Civil Service Commission negotiated a list of positions covered

by this Section because of an erroneous interpretation of the Statute.

/s/ SAMUEL D. SLADE,

/s/ ROBERT S. GREEN,

Attorneys, Department of Justice,
Counsel for Appellant.

Certificate of Service Attached.

[Endorsed]: Filed May 12, 1958. Paul P.
O'Brien, Clerk.